Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1994

DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of Kimberly Sue Wilson, Deceased,

Petitioners,

v.

ROBERT FICANO, Sheriff of Wayne County, and THE COUNTY OF WAYNE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

AND APPENDIX

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STATEMENT OF QUESTIONS PRESENTED

I.

WHERE AN UNFIT, OFF-DUTY POLICE OFFICER INTENTIONALLY AND WRONGFULLY KILLS A PERSON WITH HIS SERVICE REVOLVER, IS THE VICTIM'S CLAIM OF MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983 MEASURED BY AN OBJECTIVE STANDARD OF "DELIBERATE INDIFFERENCE," SO THAT SUBJECTIVE, ACTUAL KNOWLEDGE OF A SPECIFIC DANGER IS NOT REQUIRED, PERMITTING LIABILITY TO BE PREDICATED ON CONSTRUCTIVE KNOWLEDGE OF THE OFFICER'S INSTABILITY AND UNFITNESS AND THE RESULTANT DELIBERATELY INDIFFERENT FAILURE TO DISARM THAT OFFICER?

II.

WHERE A POLICY OR CUSTOM REGARDING THE ENTRUSTMENT OF POLICE POWERS AND WEAPONS TO UNFIT OFFICERS EVIDENCES DELIBERATE INDIFFERENCE TO A RISK OF CONSTITUTIONAL INJURY, IS CAUSATION UNDER 42 U.S.C. § 1983 SUFFICIENTLY SHOWN WHEN THE PARTICULAR OFFICER'S UNFITNESS WAS OR SHOULD HAVE BEEN KNOWN, BUT HE NONETHELESS RETAINED HIS POLICE POWERS AND POLICE WEAPON, RESULTING IN THEIR ULTIMATE MISUSE WHEN HE WRONGFULLY AND INTENTIONALLY SHOT HIS VICTIMS?

PARTIES*

1. Diana Davis, Petitioner
2. Tod A. Wilson, Petitioner
3. Robert Ficano, Sheriff of Wayne County, Respondent
4. County of Wayne, Respondent

THERE IS NO PARENT OR SUBSIDIARY COMPANY TO BE LISTED UNDER RULE 29.1

* The County of Wayne was denoted as a party in the captions of orders issued by the Wayne Circuit Court and Michigan Supreme Court, Appendix, *infra*, at A-18, A-20, A-22, A-26, A-27, and was denoted as an "appellee" on the Michigan Court of Appeals docket. However, the County of Wayne was dismissed from the action by order of December 17, 1986, appendix, *infra*, at A-16. See n. 2, *infra*.

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties ii

Table of Authorities v

Opinion Below 1

Jurisdiction 1

Statute And Constitutional Provisions Involved 2

Statement Of The Case 3

Reasons For Allowing The Writ:

I. WHERE AN UNFIT, OFF-DUTY POLICE OFFICER INTENTIONALLY AND WRONGFULLY KILLS A PERSON WITH HIS SERVICE REVOLVER, THE VICTIM'S CLAIM OF MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983 IS MEASURED BY AN OBJECTIVE STANDARD OF "DELIBERATE INDIFFERENCE," SO THAT SUBJECTIVE, ACTUAL KNOWLEDGE OF A SPECIFIC DANGER IS NOT REQUIRED, PERMITTING LIABILITY TO BE PREDICATED ON CONSTRUCTIVE KNOWLEDGE OF THE OFFICER'S INSTABILITY AND UNFITNESS AND THE RESULTANT DELIBERATELY INDIFFERENT FAILURE TO DISARM THAT OFFICER. .. 10

A. The Decision Of The Court Of Appeals Was Based On An Erroneous Standard For Deliberate Indifference Derived From Eighth Amendment Jurisprudence, And Requiring Actual Knowledge Of Marc Davis' Misdeeds Before A Policy Of "Deliberate Indifference" Could Be Found. 11

B. The Evidence Showed That Respondent Had Actual And Constructive Knowledge Of Marc Davis' History Of Violent And Explosive Behavior. 20

PAGE

II. WHERE A POLICY OR CUSTOM REGARDING THE ENTRUSTMENT OF POLICE POWERS AND WEAPONS TO UNFIT OFFICES EVIDENCES DELIBERATE INDIFFERENCE TO A RISK OF CONSTITUTIONAL INJURY, CAUSATION UNDER 42 U.S.C. § 1983 IS SUFFICIENTLY SHOWN WHEN THE PARTICULAR OFFICER'S UNFITNESS WAS OR SHOULD HAVE BEEN KNOWN, BUT HE NONETHELESS RETAINED HIS POLICE POWERS AND POLICE WEAPON, RESULTING IN THEIR ULTIMATE MISUSE WHEN HE WRONGFULLY AND INTENTIONALLY SHOT HIS VICTIMS. 23

Conclusion 30

APPENDIX:

Opinion of the Michigan Court of Appeals, 9/20/93 ..... A-1

Order of the Circuit Court for the County of Wayne, 12/17/86 ..... A-16

Order of the Circuit Court for the County of Wayne Denying Summary Disposition, 9/16/87 .. A-18

Certificate and Opinion Approving partial Settlement, Circuit Court for the County of Wayne, 3/18/88 ..... A-20

Judgment of the Circuit Court for the County of Wayne, 6/13/89 ..... A-22

Order of the Circuit Court for the County of Wayne Denying New Trial, 10/13/89 ..... A-24

Order of the Michigan Court of Appeals denying rehearing, 12/15/93 ..... A-25

Order of the Michigan Supreme Court denying leave, 11/16/94 ..... A-26

PAGE

Order of the Michigan Supreme Court denying reconsideration, 1/31/95 ..... A-27

Concise Statement of Material Facts and Proceedings submitted to Michigan Supreme Court with Application for Leave to Appeal, 2/9/94 .. A-28

TABLE OF AUTHORITIES

CASES:

Berry v. *City of Detroit*, 25 F.3d 1342 (6th Cir.) *cert. denied*, 115 S.Ct. 902 (1995) 27

Berry v. *City of Muskogee*, 900 F.2d 1489 (10th Cir., 1990) 27

Bielevicz v. *Dubinon*, 915 F.2d 845 (3rd Cir., 1990) ... 26, 27, 28

Bordanero v. *McLeod*, 871 F.2d 1151 (1st Cir.) *cert. denied*, 493 U.S. 820 (1989) 18, 27

Brandon v. *Holt*, 469 U.S. 464; 105 S.Ct. 873; 83 L.Ed.2d 878 (1985) 4, 16, 19, 27

Canton v. *Harris*, 489 U.S. 378; 109 S.Ct. 1197; 103 L.Ed.2d 412 (1989) 11, 12, 16, 22, 24, 25-26

Carroll v. *Borough of State College*, 854 F. Supp. 1184 (M.D. Pa. 1994) aff'd, 47 F.3d 1160 (1995) 20

Collins v. *Harker Heights*, 503 U.S. 115; 112 S.Ct. 1261; 117 L.Ed.2d 261 (1992) 14, 20, 26

Czajkowski v. *Chicago*, 810 F. Supp. 1428 (N.D. Ill, 1992) 18, 19, 27

Davis v. *Wayne County*, 201 Mich. App. 572; 507 N.W.2d 751 (1983) 2, 4, 9, 15, 16, 23, 29

Edwards v. *Gilbert*, 867 F.2d 32 (CA 4, 1990) 13

Estelle v. *Gamble*, 429 U.S. 97; 97 S.Ct 285; 50 L.Ed.2d 251 (1976) 14

PAGE

Fagan v. *City of Vineland*, 22 F.3d 1283 (3rd Cir., 1994) 20

Farmer v. *Brennan*, ___ U.S. ___; 114 S.Ct. 1970; 128 L.Ed.2d 811 (1994) 11-12

Fiacco v. *Rensellaer*, 783 F.2d 319 (2nd Cir., 1986) *cert. denied*, 480 U.S. 922 (1987) 17, 27

Garrett v. *Gilless*, 1995 WL 16810 (6th Cir., (Tenn)) 14, 27

Gavin v. *McGinnis*, 866 F. Supp. 1107 (ND Ill. 1994) ... 14

Gentile v. *County of Suffolk*, 926 F.2d 142 (2nd Cir., 1991) 26, 28, 29

Gibson v. *Chicago*, 910 F.2d 1510 (7th Cir., 1990) 17, 22, 27, 29

Graham v. *Connor*, 490 U.S. 386; 109 S.Ct. 1865; 102 L.Ed.2d 32 (1989) 9

Harris v. *City of Pagedale*, 821 F.2d 499 (8th Cir.) *cert. denied*, 484 U.S. 986 (1987) 27

Jett v. *Dallas Independent School District*, 491 U.S. 701; 108 S.Ct. 2702; 105 L.Ed.2d 598 (1989) 18

Lewellen v. *Metropolitan Gov't of Nashville*, 34 F.3d 345 (6th Cir., 1994) *cert. denied*, 115 S.Ct. 903 (1995) 14, 20

Manarite v. *City of Springfield*, 957 F.2d 953 (1st Cir.) *cert. denied*, 113 S.Ct. 113 (1992) 14

Molton v. *Cleveland*, 839 F.2d 240 (CA 6, 1988) 14

Monell v. *New York City Department of Social Services*, 436 U.S. 658; 56 L.Ed.2d 611; 98 S.Ct. 2018 (1978) 4, 15, 18, 24

Myatt v. *City of Chicago*, 816 F. Supp. 1259 (N.D. Ill, 1992) 29

Oklahoma City v. *Tuttle*, 471 U.S. 808; 105 S.Ct. 2427; 85 L.Ed.2d 791 (1985) 24-25

PAGE

Oviatt v. *Pearce*, 954 F.2d 1470 (9th Cir., 1992) 17, 27

Parrish v. *Luckie*, 963 F.2d 201 (8th Cir., 1992) 18

Polk v. *Dodson*, 454 U.S. 312; 102 S.Ct. 445; 70 L.Ed.2d 509 (1981) 24

Redman v. *County of San Diego*, 942 F.2d 1435 (9th Cir., 1991) *cert. denied*, 502 U.S. 1074 (1992) 27

Roberts v. *City of Troy*, 773 F.2d 720 (CA 6, 1985) 13

Russo v. *Cincinnati*, 953 F.2d 1036 (6th Cir., 1992) 17, 22, 27

Searcy v. *City of Dayton*, 38 F.3d 282 (6th Cir., 1994) 27

Spell v. *McDaniel*, 824 F.2d 1380 (6th Cir., 1987) *cert. denied*, 484 U.S. 1027 (1988) 18

State Bank of St. Charles v. *Camic*, 712 F.2d 1140 (CA 7, 1983) 13

Stoneking v. *Bradford Area School District*, 882 F.2d 720 (3rd Cir., 1989) 27

Walker v. *City of New York*, 974 F.2d 293 (2nd Cir., 1992) *cert. denied*, 113 S.Ct. 1387 (1993) 17

Wilson v. *City of Chicago*, 6 F.3d 1233 (7th Cir., 1993) *cert. denied*, 114 S.Ct. 1844 (1994) 22

Wilson v. *Seiter*, 501 U.S. 294; 111 S.Ct. 2321; 115 L.Ed.2d 271 (1991) 14

York v. *City of Detroit (After Remand)*, 438 Mich. 744; 475 N.W.2d 346 (1991) 12-13

Zuchel v. *City and County of Denver*, 997 F.2d 730 (10th Cir., 1993) 15

STATUTES, COURT RULES AND OTHER AUTHORITIES:

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983 ..... 2, 10, 11

PAGE

42 U.S.C. § 1988 1

U.S. Const. Amendment IV 2, 9

U.S. Const. Amendment XIV, § 1 ..... 3, 9

Prosser & Keeton on Law of Torts § 41, at 265-266 .. 25

1 Nahmod, Civil Rights and Liberties Litigation: The Law of § 1983 (1991 Ed.) 19

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OPINION BELOW

The opinion of the Michigan Court of Appeals is reported at 201 Mich. App. 572; 507 N.W.2d 751 (1983) and is reprinted in the appendix hereto, at A-1, *infra*.

JURISDICTION

Suit was filed against Respondents Wayne County Sheriff and Wayne County* in Wayne County Circuit Court, Michigan under 42 U.S.C. § 1983. Following a jury verdict for Petitioners, judgment was entered for Diana Davis in the amount of $803,416, for the Estate of Kimberly Wilson in the amount of $651,752 and for Tod Wilson in the amount of $50,000.[1]

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* Wayne County was subsequently dismissed, see A-16. But see n. 2. "Respondent" in the singular refers to Sheriff Ficano.

[1] The jury awarded nothing to the Davis children. Plaintiffs cross-appealed to the Michigan Court of Appeals, taking issue with the inadequacy of the damage awards and the trial court's award of costs and attorney fees under 42 U.S.C. § 1988.

On Respondent's appeal, the Michigan Court of Appeals in a decision issued September 20, 1993 reversed the circuit court judgment and directed the entry of judgment for Respondent, finding the evidence insufficient for § 1983 liability. *Davis* v. *Wayne County*, 201 Mich. App. 572; 507 N.W.2d 751 (1983). Petitioners' timely Motion for Rehearing was denied by the Michigan Court of Appeals in an order entered December 15, 1993.

The Michigan Supreme Court denied leave to appeal on November 16, 1994, and denied Petitioners' timely Motion for Rehearing on January 31, 1995. *Davis* v. *Wayne County*, 447 Mich. 959 (1995).

Petitioners invoke this Court's jurisdiction to review the judgment of the Michigan Court of Appeals under 28 U.S.C. § 1257(a).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Const. Amendment IV. Searches and seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amendment XIV, § 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Synopsis

The issue of liability in the case at bar involves the general question of officer fitness and specifically involves the Wayne County Sheriff's failure to disarm unfit officers. The essential goal of police management is to insure that officers are fit for the responsibilities and powers given to them. The potential for harm if unfit officers possess deadly force is well-known, since every officer is required to possess his/her gun 24 hours a day, and state law immunizes off-duty officers from arrest for gun possession. Because of that potential, officer fitness, as it relates to emotional stability or propensity for violence, is the fundamental aspect of police management's responsibilities. This case requires evaluation of what constitutes proper supervision, or, alternatively stated, deliberate indifference.

Officer Davis' Unfitness and Supervisory Indifference to Objectively Intolerable Facts

Before the shooting underlying this case, Marc Davis had been a Wayne County Deputy Sheriff for approximately 8½ years.[2] Petitioner Diana Davis, his wife, was also employed by the Wayne County Sheriff as a non-certified deputy.

During his years with the Wayne County Sheriff's department, Marc Davis engaged in numerous incidents of violence and misconduct, both on duty and off-duty.[3] On one occasion, Davis entered a cell where a prisoner was being held in isolation, and attacked and beat the prisoner (Tr. 4/25/89, pp 177-178). Another time Davis became extremely agitated and attempted to get at a prisoner who had punched him (Tr. 4/25/89, pp 32-34). Davis once pulled his gun on a fellow deputy (Tr. 4/25/89, p 35), and shot a hole in another deputy's locker in the deputies' locker room. While off-duty, Davis became involved in an altercation between a man and a woman in a restaurant, resulting in the local police department filing a complaint with the sheriff's department (Tr. 5/2/89, pp 48-49). In 1980 or 1981, Marc Davis

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[2] Sheriff Ficano has been sued in his official capacity as sheriff. *Davis* v. *Wayne County Sheriff*, 201 Mich. App. 572, 574 n.1; 507 NW.2d 751, 752 n.1 (1993). The trial court dismissed Wayne County and subsequently refused to permit Plaintiffs to make Wayne County itself a named Defendant, a ruling which was indisputably erroneous. *Davis*, 201 Mich. App. at 586; 507 N.W.2d at 757. The technical identification of the Defendant is largely inconsequential, however, as the focus in this "official capacity" suit is on the customs and policies of the Sheriff's Department. See *Brandon* v. *Holt*, 469 U.S. 464; 105 S.Ct. 873; 83 L.Ed.2d 878 (1985); *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 690 n. 55; 56 L.Ed.2d 611, 635 n. 55; 98 S. Ct. 2018, 2035 n. 55 (1978). Accordingly, the terms "the Department" or "Sheriff's Department" will be used to identify the body whose "customs" and "policies" are in issue.

[3] A more detailed and complete summary of the facts shown at trial, with citations to the trial transcript, is found in the "Concise Statement of Material Facts and Proceedings" which Petitioners filed in the Michigan Supreme Court together with their Application for leave to appeal, and which appears in the appendix hereto at A-28.

broke his hand by hitting a car windshield (Tr. 5/4/89, pp 71-72). During an after-hours drinking session held on Sheriff's property, Davis rode a motorcycle up a debris-packed hill and crashed into a cement wall (Tr. 4/25/89, p 40). In 1975 or 1976, while working at the Detroit House of Corrections, a local jail administered by the Wayne County Sheriff, Marc Davis came out of the kitchen covered with blood and stated that he had been killing chickens with the kitchen staff (Tr. 5/2/89, p 115). In 1980, fifteen jail inmates filed a petition against Marc Davis alleging demeaning and unprofessional conduct, resulting in a request by the jail administrator for investigation. Marc Davis once confronted Diana Davis at work and threatened to "beat her ass" (Tr. 5/12/89, p 106). Diana appeared at work and at the police academy with obvious bruises and facial injuries.

The Department conducted no psychiatric counseling of deputies, conducted no performance reviews, and provided no police-specific counselling programs for officers.[4] A "code of silence" prevailed in the Wayne County Sheriff's Department. Many times over the years command officers indicated they did not want to be bothered with reports of incidents relating to fellow deputies (Tr. 4/25/89, p 71). The departmental policy was described by Undersheriff Richard Novak as "no news is good news" (Tr. 5/3/89, p 16).

Despite the history of violence, Marc Davis received no counselling and no discipline, and remained armed. The policy of the Department required Marc Davis to carry a loaded weapon with him at all times.

On September 18, 1983, Diana Davis, who had been separated from Marc Davis for five months, was living with her two children at the home of Kimberly and Tod Wilson. The police were called to the home that night.

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[4] Respondent conceded that these practices were all "policies" attributable to the Sheriff's Department (Defendants' Brief in Michigan Court of Appeals, pp 28, 32, 33).

Garden City police officer John Sanborn was dispatched on a report of family trouble with a possible gun being involved (Tr. 4/19/89, p 11). Officer Sanborn left the home after determining that Marc Davis had authority to have a weapon because he was a deputy sheriff (Tr. 4/19/89, pp 13-14). Within an hour and a half, Marc David shot Kimberly Wilson to death; shot Diana Davis once, severing her spine and causing her to be paralyzed for life; and shot Tod Wilson twice, causing a collapsed lung and severe injuries.

This suit, filed against Wayne County Sheriff Ficano, alleges that the Department was deliberately indifferent to the risk of death or injury presented by the continued employment of Marc Davis and his required possession of a loaded weapon at all times. This deliberate indifference, it is claimed, was manifested by the customs and policies of the Department, which conducted no psychiatric counseling of deputies, conducted no performance reviews, provided no police-specific counselling programs for officers, discouraged reports of misconduct through a "code of silence," elected to conduct no investigation or discipline of Marc Davis despite his misconduct, and required him to carry a loaded gun at all times.

Sheriff Ficano testified that an urban Sheriff's Department needs a police-specific counselling program (Tr. 5/10/89, p 62). Dale Jurcisin, third in the departmental hierarchy, testified that there was no doubt in his mind that the Wayne County Sheriff's Department needed a police-specific counselling program (Tr. 4/19/89, pp 151,158). Anthony Shannon, the director of training for the Wayne County Sheriff's Department, testified that the police-specific counseling program finally adopted by Sheriff Ficano in 1986 was actually needed by the Sheriff's Department back in the 1970's (Tr. 4/24/89, pp 38-39).

Dale Jurcisin also testified that monitoring strictness and evaluation are obviously needed (Tr. 4/19/89, p 164).

An evaluation program adopted by the Wayne County Sheriff's Department in the mid 1970's was abandoned after a union grievance and arbitration which struck down the plan (Tr. 4/24/89, p 21). Anthony Shannon testified that the real reason for the failure to establish an evaluation process was economics and, in Shannon's own words, "*indifference*" (Tr. 4/24/89, p 73). Mr. Shannon testified, "the State did not require it, so why do we have to do it" (Tr. 4/24/89, p 73).

As a result of the department's failure to implement any evaluation procedures, Marc Davis had not been evaluated since he completed his probationary period in 1975 (Tr. 5/9/89, p 66). Despite the long history of misconduct detailed above, Marc Davis had never been written up for any disciplinary purpose (Tr. 4/24/89, p 61).

The case was submitted to the jury on May 17, 1989 with the following instructions:

> Plaintiff's claims in this case have been brought under section 1983 of Title 42 of the United States Code [sic: against] the defendant Sheriff Robert Ficano.
>
> Section 1983 provides that a citizen may seek damages from any person who under color of state law or custom deprives him of any rights, privileges or immunities that have been guaranteed, secured, or protected by the constitution of laws of the United States[.]
>
> In order to find Sheriff Ficano liable in this case, Plaintiffs must show that the sheriff had a policy, practice or custom which caused the plaintiffs to be injured. You cannot find Sheriff Ficano liable merely because he happened to be the employer of Marc Davis. A policy, practice or custom may be found by you that would make Sheriff Ficano liable if you determine that Sheriff Ficano had a wide spread pattern of management indifference. In order to find liability on the

> part of Sheriff Ficano you have to determine that this indifference amounted to deliberate indifference on the part of the sheriff. You may determine that there has been deliberate indifference by considering either a positive act of Sheriff Ficano or Sheriff's [sic] Ficano's failure to act.
>
> Deliberate indifference may be demonstrated where there has been a failure to act with regard to circumstances or in a area where the need to act may be characterized as being obvious. It is for you to decide whether the circumstances or the area of need can be said to be obvious, or deliberate indifference may be demonstrated where a [sic] action, be it a policy, practice or custom has occurred which is inadequate under the circumstances and its inadequacy may be characterized as being obvious. It is for you to decide whether the inadequacy of the policy, practice or custom may be characterized as being obvious. It makes no difference that Robert Ficano was the Wayne County Sheriff for only five and one half months when this incident took place, as the successor in that office the sheriff assumes legal liability for ongoing policies, practices or customs of the Wayne County sheriff. It is of course, for you to decide what those policies, practices or customs were. (Tr. 5/17/89, pp 121-122).

The court also instructed the jury regarding causation:

> Now, let me give you some definitions. When I use the words 'proximate cause', I mean first that the conduct of Sheriff Ficano must have been a cause of plaintiff's injuries, and second, that plaintiff's injuries must have been a natural and probably [sic] result of that conduct. (Tr. 5/17/89, p 114).

Respondent's Motion for J.N.O.V. was denied in an order entered October 13, 1989, appendix at A-24.

Respondent challenged the sufficiency of the evidence on appeal. The decision of the Court of Appeals reversed and directed judgment for Defendant, *Davis* v. *Wayne County Sheriff*, 201 Mich. App. 572; 507 N.W.2d 751 (1993). The appellate panel initially found that the "color of law" element was satisfied. 201 Mich. App. at 578-579, 507 N.W.2d at 754. The Court of Appeals apparently assumed as well that the victims of Marc Davis' violence were deprived of a constitutional right.[5] Applying the ordinary standards for evaluating a directed verdict or judgment n.o.v. motion in the light most favorable to the non-moving party, the Court concluded that the past conduct of Marc Davis was largely unknown to those responsible for disciplining Davis and that, "there is nothing in the record to suggest that defendant dissuaded or furthered the failure of the deputies to report the activity." 201 Mich. App. at 583; 507 N.W.2d at 756. Thus, the panel concluded that the "code of silence" "cannot be said to be a departmental policy." 201 Mich. App. at 584; 507 N.W.2d at 756. The panel also held that the evidence was insufficient to show § 1983 causation. 201 Mich. App. at 584; 507 N.W.2d at 757. Finally, the panel concluded, "even if we conclude that the action or inaction of defendant with respect to supervision and retention of its employees and operation of the department constituted a policy that was the moving force behind the violations the

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5 The constitutional violations alleged in this case were violations of the Fourth and Fourteenth Amendments (Tr. 5/10/89, p 91). Under the substantive due process clause, Petitioners asserted that the official mandate that officers carry their weapons at all times creates an obvious need to assure that officers are not so unfit and unstable that they will use their government-issued instrument to arbitrarily deprive citizens of life and liberty. Under the Fourth Amendment, Petitioners asserted that the State's use of unjustified, fatal force against three unarmed citizens is objectively unreasonable, *Graham* v. *Connor*, 490 U.S. 386, 397; 109 S.Ct. 1865; 102 L.Ed.2d 32 (1989).

plaintiffs suffered, we cannot conclude that those policies amounted to 'deliberate indifference.'" 201 Mich. App. at 585, 507 N.W.2d at 757.

Petitioners sought leave to appeal to the Michigan Supreme Court, which was denied in an order entered November 16, 1994. Respondent filed a cross-application for leave to appeal which was also denied in the order of November 16, 1994. Petitioners sought rehearing which was denied in an order entered January 31, 1995.

REASONS FOR ALLOWING THE WRIT

I.

WHERE AN UNFIT, OFF-DUTY POLICE OFFICER INTENTIONALLY AND WRONGFULLY KILLS A PERSON WITH HIS SERVICE REVOLVER, THE VICTIM'S CLAIM OF MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983 IS MEASURED BY AN OBJECTIVE STANDARD OF "DELIBERATE INDIFFERENCE," SO THAT SUBJECTIVE, ACTUAL KNOWLEDGE OF A SPECIFIC DANGER IS NOT REQUIRED, PERMITTING LIABILITY TO BE PREDICATED ON CONSTRUCTIVE KNOWLEDGE OF THE OFFICER'S INSTABILITY AND UNFITNESS AND THE RESULTANT DELIBERATELY INDIFFERENT FAILURE TO DISARM THAT OFFICER.

This case involves substantial issues regarding the state of mind or knowledge required for a municipality to be held liable under 42 U.S.C. § 1983 for a policy or custom of "deliberate indifference." Textually, § 1983 provides:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or causes to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law . . .

In *Canton v Harris*, 489 U.S. 378; 109 S.Ct. 1197; 103 L.Ed.2d 412 (1989), the Court, addressing the degree of fault that must be evidenced by a municipality's inaction before liability under § 1983 will be permitted, adopted a standard of "deliberate indifference": "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388; 109 S.Ct. at 1204; 103 L.Ed.2d at 426.

A. The Decision Of The Court Of Appeals Was Based On An Erroneous Standard For Deliberate Indifference Derived From Eighth Amendment Jurisprudence, And Requiring Actual Knowledge Of Marc Davis' Misdeeds Before A Policy Of "Deliberate Indifference" Could Be Found.

The Michigan Court of Appeals applied a standard for "deliberate indifference" erroneously derived from Eighth Amendment jurisprudence, where "deliberate indifference" requires subjective intent by a state actor.

In *Farmer* v. *Brennan*, ___ U.S. ___; 114 S.Ct. 1970; 128 L.Ed.2d 811 (1994), Justice Souter, writing for a majority of the Court, explained the difference between the test for deliberate indifference in the context of an Eighth Amendment violation, where one must show an "intent to punish," and the meaning of "deliberate indifference" in the context of municipal liability under 42 U.S.C. § 1983. Under the Eighth Amendment, the test for "deliberate indifference" is based on the criminal law concept of recklessness which requires actual knowledge. ___ U.S. ___; 114 S.Ct. at 1980; 128 L.Ed.2d at 827. Thus, Justice Souter stated the holding in *Farmer* as:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both

> be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

___ U.S. ___; 114 S.Ct. at 1979; 128 L.Ed.2d at 825.

By contrast, the standard of "deliberate indifference" required for municipal liability under *Canton* is, and must be, an objective standard. Pursuant to *Canton*, a municipality's failure to train may constitute a policy or custom actionable under § 1983 when "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390. As this Court observed in *Farmer*, "[i]t would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." ___ U.S. ___; 114 S.Ct. at 1981; 128 L.Ed.2d at 828.

Justice Souter went on to explain that the element of actual knowledge is not only unnecessary for municipal liability under *Canton*, but it would constitute a standard that would be impossible to apply: "Needless to say moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official." *Id.*

The appellate court's analysis of the instant case is premised on a confusion of the meaning of "deliberate indifference" as a constitutional standard applied to the Eighth Amendment, with the meaning of that term to define a level of culpability rendering a municipal policy actionable under *Canton*. This confusion between *Canton* "deliberate indifference" and Eighth Amendment "deliberate indifference" is found in the Michigan Supreme Court's decision in *York* v. *City of Detroit (After*

Remand), 438 Mich. 744; 475 N.W.2d 346 (1991), where the Court expressly applied the meaning of the phrase "deliberate indifference" as used in Eighth Amendment jurisprudence to define *Canton* "deliberate indifference":

> To determine the meaning of "deliberate indifference" as that phrase was used in *Canton*, it is helpful to examine Eighth Amendment jurisprudence where, in the context of the proscription of deliberate indifference to serious medical needs as cruel and unusual punishment, the words "deliberate indifference" have been filled out and given meaning. The United States Supreme Court has held that mere negligence will not amount to deliberate indifference. *Estelle* v. *Gamble*, 429 U.S. 97, 104; 97 S.Ct. 285; 50 L. Ed. 2d 251 (1976). It is established beyond question that a negligent failure to detect suicidal intent or to prevent suicide will not establish deliberate indifference to a prisoner's medical needs. *Molton* v. *Cleveland*, 839 F.2d 240, 243 (CA 6, 1988); *Roberts* v. *City of Troy*, 773 F.2d 720, 724-725 (CA 6, 1985); *State Bank of St. Charles* v. *Camic*, 712 F.2d 1140, 1146 (CA 7, 1983). Thus, the federal circuit courts consistently decline to find the failure to take steps to prevent suicide to constitute deliberate indifference absent a previous threat of or attempted suicide. See *Edwards* v. *Gilbert*, 867 F.2d 32, 35-36 (CA 4, 1990); *State Bank of St. Charles* v. *Camic*, *supra*. Deliberate indifference contemplates knowledge, actual or constructive, and a conscious disregard of a known danger. Thus, it is clear that mere negligence cannot constitute a municipal policy of deliberate indifference.

438 Mich. at 757; 475 N.W.2d at 475. (footnote omitted).

The Michigan Supreme Court is not alone in treating the Eighth Amendment and *Canton* standards for "delib-

erate indifference" as interchangeable. In *Manarite* v. *City of Springfield*, 957 F.2d 953 (1st Cir.) *cert. denied*, 113 S.Ct. 113 (1992), for example, the Court of Appeals for the First Circuit cited *Canton*, which defines "the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents" (*Collins*, 503 U.S. at ___; 112 S.Ct. at 1068, 117 L.Ed.2d at 272), along with *Estelle* v. *Gamble*, 429 U.S. 97, 104; 97 S.Ct. 285; 50 L.Ed.2d 251 (1976), which holds that "deliberate indifference to serious medical needs of prisoners" violates the Eight Amendment proscription against cruel and unusual punishment, and *Wilson* v. *Seiter*, 501 U.S. 294, 111 S.Ct. 2321; 115 L.Ed.2d 271 (1991), applying the Eighth Amendment "deliberate indifference" standard to prisoner-conditions cases; all for the proposition that "Section 1983 permits recovery for loss of life (or for serious physical harm) only where the defendant acts *intentionally* or with an analogous state of mind usually described as 'deliberate indifference' to deprivation of the victim's constitutional right." 957 F.2d at 955. *See also Molton* v. *City of Cleveland*, 839 F.2d 240, 247 (6th Cir., 1988) *cert. denied*, 489 U.S. 1068 (1989) (finding no actionable policy and stating "[n]egligence does not establish a § 1983 claim," with citation to *Estelle*, *supra* and *Daniels* v. *Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)); *Gavin* v. *McGinnis*, 866 F. Supp. 1107, 1112 (ND Ill. 1994) (applying Eighth Amendment standard for cruel and unusual punishments to supervisory liability under § 1983).[6]

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6 *See also Garrett* v. *Gilless*, 1995 WL 16810 (6th Cir., (Tenn)) where the Sixth Circuit Court of Appeals apparently melded the standard for a substantive due process violation as defined in *Lewellen* v. *Metropolitan Govt of Nashville*, 34 F.3d 345 (6th Cir., 1994) *cert. denied*, 115 S.Ct. 903 (1995) with the standard for an actionable policy or custom, *Canton*, *supra*. The Court wrote:

> [W]e cannot conclude, based on the record before us, that defendants had a policy to permit off-duty officers to carry weapons to commit spousal abuse and other acts of violence. At best, defendants' policy allowing off-duty officers to carry their weapons amounts to negligence, which is insufficient to impose liability. See, e.g., *Lewellen* v. *Metropolitan Gov't of Nashville*, 34 F.3d 345 (6th Cir.), reh'g en banc, denied, 1994 U.S. App. Lexis 28696 (6th Cir. Oct. 12, 1994).

As a result of the erroneous overlay of the meaning of "deliberate indifference" in Eighth Amendment jurisprudence onto the phrase as articulated in *Canton*, the Michigan Court of Appeals required *actual knowledge* of Marc Davis' misdeeds as a predicate for § 1983 liability:

> Given the conclusion that the need for training or other departmental action must be obvious, *Canton, supra* at 390, *we believe that there must be some knowledge on the part of defendant that an off-duty officer is likely to commit a violation and, yet, defendant fails to take steps to prevent that officer from so doing.*

201 Mich. App. at 581; 507 N.W.2d at 755-756. (Emphasis added).

This improper view of "deliberate indifference" rips out the heart of *Canton* because it allows a denial of *subjective* knowledge on the part of supervisory officials to preclude a finding of municipal policy or custom.[7] Thus, the Court of Appeals relied on the fact that the incidents involving Marc Davis were not reported up the chain of command, and took place over Davis' eight year career, in support of its finding that the County did not maintain a policy of deliberate indifference. 201 Mich. App. at 583, 507 N.W.2d at 756. Similarly the appel-

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[7] In the instant case the Court of Appeals relied on testimony of employees and administrators within the department to the effect "that the so-called code of silence was in no way a policy of the office" in order to conclude that in fact no such policy existed. 201 Mich App at 583-584, 507 NW2d at 756. The major shortcoming of this legal analysis stems from the Court of Appeals' use of the "policy" nomenclature to describe the Department's failure to investigate and code of silence, practices more accurately described as § 1983 "custom," *Monell v New York Dep't of Social Services*, 436 U.S. 658, 690-691; 98 S.Ct. 2018, 2035-2036; 56 L.Ed.2d 611, 635-636 (1978). A second legal error is the panel's failure to apply the required Petitioner-favorable view of the facts, *Zuchel* v. *City and County of Denver*, 997 F.2d 730, 734 (10th Cir., 1993). Apart from these two errors, the panel's analysis reflects its assumption that an actionable policy requires subjective intent, i.e., actual knowledge of past misdeeds and of likely constitutional deprivations.

late panel stated, "[a]bsent some evidence that the department deliberately furthered the code of silence, or was consciously indifferent to its existence, it cannot be said to be a departmental policy." 201 Mich. App. at 584, 507 N.W.2d at 756.[8]

This Court's jurisprudence teaches that a municipality's claim of ignorance, or its actual ignorance, regarding the activities of the "rank and file" does not conclusively show the absence of an actionable policy or custom. In *Brandon* v. *Holt*, 469 U.S. 464; 105 S.Ct 873; 83 L.Ed.2d 878 (1985), this Court held that liability could be properly imposed against a municipal entity where the police director had been found liable in his official capacity based on the district court's factual finding that the police director "should have known that officer Allen's dangerous propensities created a threat to the rights and safety of citizens." That this knowledge was not more direct was itself attributable to a "code of silence" by which "few — if any — formal complaints were ever filed by police personnel", a practice described as "the inherently deficient nature of police administrative procedures involving a discovery of official misconduct." 469 U.S. at 467, and n. 6; 105 S.Ct. at 875, and n. 6; 83 L.Ed.2d at 882, and n. 6.

Canton suggests that "deliberate indifference" consists of the obvious need to address a law enforcement problem, coupled with "inadequacy" "likely to result in the violation of constitutional rights." The risk of constitutional violation may be "obvious" due to the inherent nature of the problem, such as "the need to train officers in the constitutional limitations on the use of deadly force." *Canton*, 489 U.S. at 390 n. 10; 109 S.Ct. at

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8 **Even under the more rigorous Eighth Amendment standard for "deliberate indifference," the Court in *Farmer* observed that prison officials "could not plausibly persist in claiming lack of awareness" where the evidence shows a prisoner faces "an objectively intolerable risk of serious injury." __ U.S. at __ n. 9; 114 S.Ct. at 1983 n. 9; 128 L.Ed.2d at 811 n. 9.**

1205 n.10; 103 L.Ed.2d at 427 n.10. Or, the risk may be revealed by a history of constitutional violations: "It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Id.*

The first variety of constructive knowledge — inferrable from the nature of the problem — is illustrated in cases such as *Russo* v. *Cincinnati*, 953 F.2d 1036 (6th Cir., 1992) (deliberate indifference may be found where officers received nominal training and did not understand appropriate procedures for dealing with mentally ill individuals) and *Walker* v. *City of New York*, 974 F.2d 293 (2nd Cir., 1992) *cert. denied*, 113 S.Ct. 1387, 1412 (1993) (failure to train officers not to commit perjury to obtain convictions and to observe constitutional requirements regarding exculpatory evidence). The second variety of knowledge — inferrable from a history of constitutional violations such that "the need for further training must have been plainly obvious" — may be demonstrated by a history of problems in the department. *Fiacco* v. *Rensellaer*, 783 F.2d 319, 331 (2nd Cir., 1986) *cert. denied*, 480 U.S. 922 (1987) (despite facially appropriate procedures, a jury may find that the practice of non-investigation and inaction to complaints of excessive force by police offices shows that "the City defendants' response to complaints of excessive force by City police officers was uninterested and superficial" "and should be viewed by an objective observer as reflecting an indifference by the City to the use of excessive force"); *Oviatt* v. *Pearce*, 954 F.2d 1470, 1477-1479 (9th Cir., 1992) (failure to adopt procedure to prevent continued incarceration of prisoners not arraigned, when this problem had occurred in the past, may be viewed as "deliberate indifference"), or by the background of the particular officer, *Gibson* v. *Chicago*, 910 F.2d 1510 (7th Cir., 1990) (failure to adopt adequate pro-

cedure for taking gun from officer whose personal history reveals psychological imbalance rendering him unfit for duty); *Parrish* v. *Luckie*, 963 F.2d 201, 204 (8th Cir., 1992) (failure to investigate complaint through chain of command by officer receiving report, coupled with failure to investigate prior incidents, may constitute "deliberate indifference" to citizen raped by police officer).

Particularly when liability is premised on a § 1983 "custom" "which has not received formal approval through the body's official decisionmaking channels," *Monell*, 436 U.S. at 690-691; 56 L.Ed.2d at 635-636; 98 S.Ct. at 2035-2036, the search for municipal "knowledge" presents inherent conceptual difficulty. An actionable "custom" arises from government's "acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedures' of the local governmental entity," *Jett* v. *Dallas Independent School District*, 491 U.S. 701, 737; 108 S.Ct. 2702; 105 L.Ed.2d 598, 628 (1989). Thus, a "custom" may be attributed to a municipality by virtue of "either actual or constructive knowledge by the municipal governing body that the practices have become customary among its employees." *Spell* v. *McDaniel*, 824 F.2d 1380, 1387 (6th Cir., 1987) *cert. denied*, 484 U.S. 1027 (1988). "Constructive knowledge maybe evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of them." *Id.*; *Bordanero* v. *McLeod*, 871 F.2d 1151, 1157 (1st Cir.) *cert. denied*, 493 U.S. 820 (1989); *Czajkowski* v. *Chicago*, 810 F. Supp. 1428, 1439 (N.D. Ill, 1992).

Even more specifically, in those cases alleging the failure to penetrate a "code of silence" as an actionable custom, it may be *presumed* that the code itself may have precluded actual knowledge by policymakers of police misconduct. Thus, where the custom is to insulate officers from investigation or discipline by a code

of silence, a jury may permissibly find that the inaction constitutes "deliberate indifference." *Spell* (in the wake of past complaints of excessive force, no punishment occurred "because the policy of an effective "code of silence" within the department, was "tacitly encouraged . . . by the deliberate failure of responsible municipal officials to exercise discipline or corrective supervision"); *Czajkowski* (failure to act on pattern of domestic violence, due to "code of silence", may constitute "deliberate indifference" to rights of officer's ex-spouse) C.f. *Brandon*, 469 U.S. at 467; 105 S.Ct. at 875; 83 L.Ed.2d at 882 (liability imposed upon municipality where Director of Police found liable in official capacity for policies including "the inherently deficient nature of police administrative procedures involving the discovery of official misconduct"). Under these decisions, a municipality may be "deliberately indifferent" to the risk of constitutional violation when it has "acquiesced" in a "code of silence" which ensures its ignorance of actual violations.

Based upon these authorities, it may safely be said that "deliberate indifference" does not require actual knowledge that a particular officer is likely to commit a constitutional violation. However, as evidenced by the decision in this case, the term "deliberate indifference" as the defining characteristic of an actionable § 1983 custom or policy is sorely in need of definition, especially in a case alleging "custom" and more so where the custom is one of acquiescence in a "code of silence."

Professor Nahmod has remarked that the *Canton* "deliberate indifference" standard "is rapidly turning into a standard for all seasons, because it also applies to Eighth Amendment violations and punitive damages . . . and probably will also govern due process as well." 1 Nahmod § 3.23, p 245, n. 19, Civil Rights and Liberties Litigation: The Law of § 1983 (1991

Ed.).[9] The Court of Appeals decision calls for clarification because it confuses the meaning of "deliberate indifference" in Eighth Amendment jurisprudence with the meaning of that phrase as used in *Canton* to define the level of culpability which will permit a municipal policy of inaction to form a basis for § 1983 liability. The instant case illustrates the need for this Court to define the phrase "deliberate indifference" within § 1983 jurisprudence.

B. The Evidence Showed That Respondent Had Actual And Constructive Knowledge Of Marc Davis' History Of Violent And Explosive Behavior.

Under any of the types of constructive knowledge found in the existing cases, the evidence was sufficient to show deliberate indifference in the instant case; the evidence even showed *actual* knowledge of Marc Davis' history of violent and unstable behavior.

The danger of police-inflicted constitutional deprivation is a foreseeable product of psychological stress and the ready availability of a weapon. The systemic pressures of the times — understaffing, excess overtime, instability due to promotions and demotions, the integration of women into the work force and the like — were self-evident. The particular risk of violence by

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9 This court has since issued *Collins*, holding that "the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace and [a municipality's] alleged failure to warn its sanitation department employees was not arbitrary in a constitutional sense." 503 US at ___; 112 S Ct at 1071; 117 L.Ed.2d at 276. The Sixth Circuit Court of Appeals has subsequently held that "gross negligence is not actionable [as a due process violation] under § 1983 because it is not 'arbitrary in a constitutional sense'" *Lewellen* v. *Metropolitan Gov't of Nashville*, 34 F.3d 345, 351 (6th Cir., 1994). However, the Court of Appeals for the Third Circuit has held, subsequent to *Collins*, that "deliberate indifference" will suffice to establish municipal liability for a deprivation of life or liberty. *Fagan* v. *City of Vineland*, 22 F.3d 1283, 1292 (3rd Cir., 1994); *Carroll* v. *Borough of State College*, 854 F. Supp. 1184, 1195 (M.D. Pa. 1994) aff'd 47 F.3d 1160 (1995).

Department personnel had already reared its ugly head. Thus, the risk of police violence was "obvious" not only because it was inherent in the conditions known to exist, but also because it had already occurred prior to the rampage of Marc Davis.

The unfitness of Marc Davis in particular was likewise "obvious." He had beaten one inmate, threatened to beat another, and been the subject of a formal complaint by 15 inmates, as well as another complaint by the Belleville police department. He had pulled a gun on one colleague and fired his gun in the locker room. His mental decomposition was characterized by destructive and self-destructive conduct: on-premises drinking, smashing a windshield, driving his motorcycle into a wall. Even apart from the violence inflicted on Diana, Marc Davis displayed bizarre conduct which provided at least "constructive knowledge" of the need to take corrective action.

Finally, there was actual knowledge of Marc Davis' past violence toward his wife. Both Marc and Diana divulged the beatings to other officers. Supervisory personnel were aware of the beatings which, at least on one occasion, were complained of through the chain of command.[10] It was obvious that Diana Davis was herself a target of the misconduct. Reasonable jurors could rationally conclude that Defendant had actual and constructive knowledge which made it obvious that a constitutional deprivation was likely to occur.

There is also overwhelming evidence of culpable inaction in the face of that known risk. Appropriate police procedures called for psychological screening to assist in identifying those unsuitable to police work. Defendant elected not to adopt a screening process.

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[10] **Petitioners' evidence showing that supervisory personnel were aware of the beatings is summarized in the appendix hereto at A-36–A-39.**

The second line of protection consists of police-specific counselling to assure that help is available to police officers from experienced professionals knowledgeable about the stresses of police work. This requirement was recognized in the law enforcement community long ago as essential. Defendant opted not to employ this practice.[11]

The third line of protection consists of active investigations and discipline. This requires assuring that Department employees report the misconduct of others and that the uppermost policy-makers take an active role in supervising and overseeing errant deputies. The Department remained indifferent to the "code of silence", taking no steps to break the code.[12]

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11 The "county-wide" program referred to by the Court of Appeals was so woefully inadequate that it had no paid professional staff at all, was not police-specific and was not even known to deputies in the Department (Tr. 4/19/88, p 149; Tr. 4/20/89, p 66; 4/25/89, pp 49, 180; Tr. 5/2/89, pp 50, 110-111; Tr. 5/4/89, pp 70-71). The appellate panel's reasoning appeared to be that the existence of *some* policy, however inadequate, was conclusive proof that Defendant was not "deliberately indifferent." *Canton* itself recognized that the *adequacy* of governmental "policy" is the issue. "Deliberate indifference" exists when "the need for *more or different training* is . . . obvious, and the *inadequacy* . . . likely to result" in constitutional deprivations, 489 U.S. at 390; 109 S.Ct. at 1205; 103 L.Ed.2d at 427 (emphasis added). *See also Russo*, 953 F.2d 1036, 1047 (genuine issue of fact regarding adequacy of City's training found where city offered a seven-hour course entitled "Disturbed-Distressed Persons"); *Gibson*, 910 F.2d at 1522 n. 20 ("The issue in this case is not whether the City had a policy, but whether the City's policy was *inadequate* (i.e., did not go far enough) in addressing the risk the policy was designed to prevent"). *But see, Wilson* v. *City of Chicago*, 6 F.3d 1233, 1240 (7th Cir., 1993) *cert. denied*, 114 S.Ct. 1844 (1994) ("[I]f [Superintendent of Police] took steps to eliminate [police abuse of suspected cop-killers], the fact that the steps were not effective would not establish that he had acquiesced in it and by doing so adopted it as a policy of the city.").

12 The appellate panel found to the contrary, stating, "with regard to the allegations that there existed a code of silence within the department, the uncontroverted testimony established that it was not the policy of the department to permit such activity. In fact, much of the testimony of supervisors and training personnel suggested that every possible effort to break the code of silence

(*concluded on page 23*)

In view of the code of silence, periodic evaluations are necessary. This was, again, well known and documented in the law enforcement community long ago. The Department ignored this requirement for years. Its conscious practice was to have no formal evaluation for Marc Davis over the 8½ years in which he succumbed to the stresses of the job, acquired numerous complaints, and exhibited increasingly bizarre conduct.

Indeed, it consciously ignored the complaints it did receive, not only encouraging the code of silence (why bother complaining if the complaints will be ignored?), but manifesting the Department's lack of concern over actual complaints, formal and informal. The persistent refusal to investigate, let alone discipline, sufficiently demonstrates the Department's deliberate indifference to the likelihood that an unstable deputy, required by Department policy to be armed at all times, would "snap" with fatal consequences.

II.

WHERE A POLICY OR CUSTOM REGARDING THE ENTRUSTMENT OF POLICE POWERS AND WEAPONS TO UNFIT OFFICERS EVIDENCES DELIBERATE INDIFFERENCE TO A RISK OF CONSTITUTIONAL INJURY, CAUSATION UNDER 42 U.S.C. §1983 IS SUFFICIENTLY SHOWN WHEN THE PARTICULAR OFFICER'S UNFITNESS WAS OR SHOULD HAVE BEEN KNOWN, BUT HE NONETHELESS RETAINED HIS POLICE POWERS AND POLICE WEAPON, RESULTING IN THEIR ULTIMATE MISUSE WHEN HE WRONGFULLY AND INTENTIONALLY SHOT HIS VICTIMS.

The Court of Appeals applied an erroneous standard for causation, based upon the subjective motivation of

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(*continued from page 22*)

was undertaken." 201 Mich. App. at 585, 507 N.W.2d at 757. The quoted language exemplifies the appellate panel's failure to view the evidence in the light most favorable to Petitioners as was required when reviewing Respondent's claim that the evidence was insufficient to support the verdict. Petitioners' evidence showing that command officers knew of and actively furthered the "code of silence" is summarized in the appendix hereto at A-46–A-47.

Marc Davis, that is inconsistent with this Court's pronouncements in *Canton* and *Collins* v. *Harker Heights*, 503 U.S. 115, 112 S.Ct. 1261, 117 L. Ed. 2d 261 (1992).

The language of § 1983 recognizes alternative theories of causation, "subject[s] or cause[s] to be subjected." As the second prong — "cause[s] to be subjected" — implies, it is not necessary that the government directly subject the victim to a constitutional deprivation. It is enough if the government's policy or custom of deliberate indifference results in such deprivation; i.e., if the government "causes" the plaintiff "to be subjected" to injury by another. Nonetheless, the specific standard for causation arising from governmental "policy" or "custom" has proven elusive.

Monell found that "the language of § 1983, read against the background of the legislative history, compels the conclusion that Congress [intended] municipalities to be held liable [if] action pursuant to official municipal policy of some nature *caused* a constitutional tort. 436 U.S. at 691; 98 S.Ct. at 2036; 56 L.Ed.2d at 636. In *Monell*, municipal liability under § 1983 was found to exist where official policy was "the moving force of the constitutional violation . . ." 436 U.S. at 694-695; 98 S.Ct. at 2038; 56 L.Ed.2d at 638. *Polk* v. *Dodson*, 454 U.S. 312, 326; 102 S.Ct. 445; 70 L.Ed.2d 509 (1981), reaffirmed that "official policy must be 'the moving force of the constitutional violation' in order to establish the liability of a governmental body under § 1983."

In *Oklahoma City* v. *Tuttle*, 471 U.S. 808; 105 S.Ct. 2427; 85 L.Ed.2d 791 (1985), this Court in a plurality decision again addressed the issue of causation under § 1983. Justice Rehnquist, joined by Justices White and O'Connor, advised that "but for" causation is not sufficient in itself to establish § 1983 liability, and therefore an "affirmative link" between official policy and the alleged constitutional violation is required:

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can

> be identified behind almost any such harm inflicted by a municipal official; for example, [the police officer] would never have killed [the plaintiff's decedent] if Oklahoma City did not have a "policy" of establishing a police force. But Monell must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

471 U.S. at 823, 105 S.Ct. at 2436; 85 L.Ed.2d at 804. (Rehnquist, J.). Justice Brennan agreed that "but for" causation is not enough to establish liability: "Ordinary principles of causation used throughout the law of torts recognize that 'but for' causation, while probably a necessary condition for liability, is never a sufficient condition of liability. See generally Prosser & Keeton on Law of Torts § 41, at 265-266." 471 U.S. at 833 n. 9; 105 S.Ct. at 2441 n. 9; 85 L.Ed.2d at 810 n. 9 (Brennan, J.).

In *Canton*, the Court phrased the inquiry as "whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." 489 U.S. at 385; 109 S.Ct. at 1203; 103 L.Ed.2d at 424. The Court suggested that the necessary "direct causal link" is actually shown by proof of a policy or custom of "deliberate indifference":

> We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell*, 436 U.S. at 694, 56 L.Ed.2d 611, 98 S.Ct. 2018, and *Polk County* v. *Dodson*, 454 U.S. 312, 326 70 L.Ed.2d 509, 102 S.Ct. 445 (1981), that a municipality can be liable under § 1983 only where its

> policies are the 'moving force [behind] the constitutional violation.'

Canton, 489 U.S. at 388-389; 109 S.Ct. at 1204-1205; 103 L.Ed.2d at 426-427 (footnote omitted).

The "deliberate indifference" element itself presupposes a cognizable risk of constitutional violation that is likely to occur absent appropriate precautions, and the government's culpable failure to take action in the face of knowledge of that risk. Thus the *Canton* Court suggested that the same constellation of fact which establishes "deliberate indifference" establishes that a foreseeable injury which occurs through governmental inaction is "caused" by the deliberate indifference to that risk. So long as "cause in fact" may be inferred ("respondent must still prove that the deficiency in training *actually caused* the police officers' indifference to his medical needs," *Canton*, 489 U.S. at 391; 109 S.Ct. at 1206; 103 L.Ed.2d at 428, (emphasis added)), the very factors which comprise deliberate indifference also establish causation.

In *Collins*, this Court again appeared to characterize "deliberate indifference" as the relevant causation standard: "[W]e held [in *Canton*] that the inadequate training of police officers could be characterized as the cause of the constitutional tort if — and only if — the failure to train amounted to "deliberate indifference" to the rights of persons with whom the police come into contact." 503 U.S. at ___; 112 S.Ct. at 1068; 117 L.Ed.2d at 272.

Several federal circuit courts have applied similar reasoning. For example, in *Gentile* v. *County of Suffolk*, 926 F.2d 142, 153 (2nd Cir., 1991), the Court held that a causal connection could be "implied" where deliberate indifference is found. In *Bielevicz* v. *Dubinon*, 915 F.2d 845, 851 (3rd Cir., 1990), the Third Circuit Court of Appeals applied a "plausible nexus" causation standard and found that "[i]f the City is shown to have tolerated

known misconduct by police officers, the issue whether the City's inaction contributed to the individual officer's decision to arrest the plaintiffs unlawfully in this instance is a question of fact for the jury." With citation to *Brandon* v. *Holt*, 469 U.S. 464; 105 S.Ct. 873; 83 L.Ed.2d 878 (1985), the *Bielevicz* court reasoned, "it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions." 915 F.2d at 851.[13]

Other cases, however, have rejected the inference that a failure to properly deal with police misconduct facilitates future misconduct. The Sixth Circuit Court thus criticized the theory that lax discipline encourages future misconduct, because "[i]t assumes, without any basis in fact or logic, that police officers will be extravagant in their use of deadly force if they know discipline will not be severe if a shooting occurs." *Berry* v. *City of Detroit*, 25 F.3d 1342, 1352 (6th Cir.) *cert. denied*, 115 S.Ct. 902 (1995). Similarly in *Searcy* v. *City of Dayton*, 38 F.3d 282, 287 (6th Cir., 1994), the Court found "no evidence to indicate that the failure to investigate other unconnected misconduct [by the same officer who shot plaintiff's decedent] was the moving force behind the shooting of plaintiffs."[14]

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13 Other cases have explicitly or implicitly recognized the fundamental truism that Government's "deliberate indifference" to past instances of misconduct has the effect of encouraging future misconduct and permitting future misconduct of a similar nature to occur. See *e.g.*, *Redman* v. *County of San Diego*, 942 F.2d 1435, 1445 (9th Cir., 1991) *cert. denied*, 502 U.S. 1074 (1992); *Czajkowski*; *Oviatt*; *Gibson*; *Fiacco*; *Russo*; *Berry* v. *City of Muskogee*, 900 F.2d 1489 (10th Cir., 1990); *Bordanaro* v. *McLeod*, 871 F.2d 1151 (1st Cir.) *cert. denied*, 493 U.S. 820 (1989); *Stoneking* v. *Bradford Area School District*, 882 F.2d 720 (3rd Cir., 1989); *Harris* v. *City of Pagedale*, 821 F.2d 499 (8th Cir.) *cert. denied*, 484 U.S. 986 (1987).

14 *See also Garrett* v. *Gilless*, 1995 WL 16810 (6th Cir., (Tenn)) (where deputy shot wife and daughter after threatening to kill wife, breaking into her home and shooting out and flattening her automobile tires, all incidents known to deputy's superiors, court found that Department's inaction was not proximate cause of injuries, notwithstanding Department's policy permitting off-duty officers to carry weapons).

The facts of this case parallel those in *Bielevicz*, *Gentile*, and many of the cases cited in n. 13, *supra*. The "deliberate indifference" consists, in large part, of the Department's failure to act on complaints of the misconduct of Marc Davis, and the failure to implement any evaluation or police-specific counseling program in the face of an obvious need for the same. Police management, because it arms people and empowers them as police agents, requiring them to carry weapons 24 hours a day, directly links itself to the potential misuse of police weapons, on or off-duty, and thereby creates the duty, which it recognizes[15] to closely supervise its officers. The very purpose of psychological evaluations, police-specific counselling, and periodic evaluations is to identify police officers who are unfit to be entrusted with a gun, so that the stress can be treated and they can be disarmed. A predictable result of deliberate indifference in these areas is the misuse of a gun by an unbalanced officer.

The apparently conflicting standards for § 1983 causation applied in the federal circuits call for a grant of certiorari. If this Court's decisions were properly applied in *Gentile* and *Bielevicz*, then causation may be inferred in the instant case as well, where the admitted policies of the department were not to conduct psychological screening, not to conduct performance evaluations, and not to provide police-specific counselling, and where the custom of the department, stemming from a code of silence which was or should have been known to the Department, was not to discipline or investigate incidents of misconduct.

The Court of Appeals in the instant case applied an erroneous standard for causation that hinged on the

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15 **Petitioner has asserted that Respondent has a duty to ensure that its deputy Sheriffs are fit to carry guns. Respondent stated, "Defendant has never argued that such a duty does not exist, and that it is owed to the public in general, of which Plaintiffs are members" (Defendant's Brief in Michigan Court of Appeals, p 24).**

subjective motivation of Mr. Davis and on the fact that his acts were not within the "scope of employment." The appellate panel concluded "[w]e are not ready to impose monetary liability on municipalities or other government agencies for employee conduct that occurs outside the scope of employment unless that conduct is very clearly motivated by official policies or customs to which the employee is expected to adhere." 201 Mich. App. at 589.

Nothing in this Court's § 1983 jurisprudence suggests that an actor must be consciously motivated by a municipal policy; it is enough that his actions are causally related to the policy. See *Gentile*, 926 F.2d at 152. Nor does § 1983 contain any "scope of employment" requirement. Given the appellate court's finding that the "color of law" element was satisfied, 201 Mich. App. at 577-578; 507 N.W.2d at 754, it was immaterial whether Davis acted within the "scope of employment." See *Gentile* (affirming jury verdict in § 1983 action based on off-duty altercation and malicious prosecution allegedly caused by failure to investigate/discipline police officers); *Gibson* (shooting committed by officer who was on leave for medical condition and stripped of police powers could be the basis for § 1983 claim against the city); *Myatt* v. *City of Chicago*, 816 F. Supp. 1259, 1265 (N.D. Ill. 1992) ("[E]ven if defendants [police officers] were not acting as city employees, municipal policy still may have been the 'moving force' behind [plaintiff's] constitutional violation").

Ultimately, the Court of Appeals appeared to apply a heightened causation requirement in the case at bar because Marc Davis was not acting in the "scope of employment" when he shot Diana Davis, Kimberly Wilson and Tod Wilson. This heightened causation requirement for activity outside the "scope of employment" is inconsistent with *Canton* and *Collins*.

CONCLUSION

For these reasons, this petition for certiorari should be granted. Alternatively, this case should be remanded to the Michigan Court of Appeals or to the Michigan Supreme Court, to determine whether the Court of Appeals applied an erroneous standard for "deliberate indifference" derived from Eighth Amendment jurisprudence, and to apply the correct standard of causation applicable in a § 1983 action.

Respectfully submitted,

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Dated: April 27, 1995

APPENDIX TO PETITION FOR CERTIORARI

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OPINION
[Synopsis and Headnotes Omitted]

(State of Michigan — Court of Appeals)

(Submitted July 7, 1993, at Detroit;
Decided September 20, 1993, at 9:45 a.m.)

(DAVIS v WAYNE COUNTY SHERIFF)

Hugh M. Davis, Jr., for Diana Davis; *Robert Horvath*, for Tod A. Wilson; *Saul A. Green*, Corporation Counsel, *Mary S. Rowan*, Assistant Counsel, and *Garan, Lucow, Miller, Seward, Cooper & Becker* (by *James G. Gross*, *Mary T. Nemeth*, and *Rosalind Rochkind*), for Wayne County Sheriff Robert Ficano.

Before: DOCTOROFF, C.J.,
and MICHAEL J. KELLY and GRIBBS, JJ.

DOCTOROFF, C.J.

Following a lengthy jury trial, plaintiffs were awarded various amounts of money in relation to their claims against the Wayne County Sheriff, Robert Ficano (hereafter the defendant), premised upon alleged violations of their constitutional rights as protected by 42 USC 1983.[1] Defendant appeals the June 13, 1989, judgment incorporating the terms of the verdict, and plaintiffs cross appeal, each raising a number of issues. We

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[1] **Throughout this opinion, we will use "defendant" to refer exclusively to Robert Ficano, who was sued in his official capacity as sheriff of Wayne County. See *Monell* v *New York City Dep't of Social Services*, 436 US 658, 691, n 54; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Where appropriate, the other parties that were named as defendants will be referred to in the specific manner designated in the opinion.**

reverse and remand to the trial court for entry of judgment in favor of defendant.

The facts giving rise to plaintiffs' claims are tragic and essentially undisputed.[2] Marc Davis (hereafter Davis) was employed by the County of Wayne as a deputy sheriff under the supervision of defendant. His wife, Diana Davis (hereafter Diana), was also employed by Wayne County under defendant's supervision and was nearing completion of the deputy sheriff training academy. Diana and Davis had been experiencing marital difficulties and were separated at the time of the incident. Diana and her two children were living with her half-sister, Kimberly Wilson (hereafter Kim), and Kim's husband, Tod Wilson (hereafter Tod). While off duty on the night of September 18, 1983, Davis came to the Wilson residence. An argument between Davis and Diana ensued. At one point, a Garden City police officer was dispatched to the scene to investigate the disturbance. After Diana assured the officer that she was not in danger, the officer left the scene.

About a half hour later, the argument again became heated. Tod and Kim also became engaged in the argument and attempted to offer Diana assistance. Testimony revealed that Davis had opened the trunk of Diana's car and began throwing her personal belongings on the Wilsons' driveway and front yard. Diana made some comments to the effect that she would take everything Davis had, including his job. At this point, Davis produced his service revolver and began shooting. As a result of the shooting rampage, Kim was killed, Tod was seriously wounded, and Diana was rendered a paraplegic. Davis was later convicted of various crimes related to the shooting, and all of the victims filed this

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2 Throughout this opinion, we will use "plaintiffs" to refer to all of the parties to the 42 USC 1983 claim. Where appropriate, we will designate the individual plaintiffs by their names as specified in the opinion.

action claiming, among other things, that they had been deprived of their constitutional rights as protected under 42 USC 1983.

Initially, plaintiffs named Wayne County and defendant jointly, arguing common-law negligence. However, following a motion for summary disposition under MCR 2.116(C)(7), the court dismissed Wayne County pursuant to the doctrine of governmental immunity. The court also dismissed the negligence count against defendant on the same ground. Davis was initially named as a defendant in the suit, but was dismissed before trial, apparently pursuant to the provisions of a settlement. Plaintiffs proceeded to trial against defendant solely upon the theory that defendant violated their constitutional rights by adopting and maintaining departmental policies that precluded defendant from recognizing the danger attendant to Davis' continued possession and use of a firearm. Following a four-week trial, the jury awarded Diana $803,416, Kim's estate $651,752, Tod $50,000, and no recovery for the Davis' children.[3] We reverse the verdict and remand for entry of judgment in favor of defendant.

Pursuant to its terms, 42 USC 1983 provides a remedy against any person who, under color of state law, deprives another of the rights protected by the Constitution. *Collins* v *Harker Heights*, 503 US ___; 112 S Ct 1061, 1066; 117 L Ed 2d 261 (1992); *Monell* v *New York City Dep't of Social Services*, 436 US 658, 690; 98 S Ct 2018; 56 L Ed 2d 611 (1978). The statute creates no substantive rights, but instead merely supplies a remedy for deprivation of rights created by other laws. *Graham* v *Connor*, 490 US 386, 393-394; 109 S Ct 1865; 104 L Ed 2d 443 (1989); *York* v *Detroit (After Remand)*, 438 Mich 744,

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3 The children's claims were obviously derivative because they were not physically injured or present at the time of the shooting. On cross appeal, the lack of recovery for the children is also raised as an issue. However, for reasons that will become apparent, the argument is moot.

757-758; 475 NS2d 346 (1991). Liability under this section must be premised upon more than the fact that the municipality employs a tortfeasor. *Monell*, *supra* at 691. In other words, respondeat superior is not a sufficient theory upon which to premise liability. *Id.*; Schuck, *Municipal liability under Section 1983: Some lessons from tort law and organization theory*, 77 Geo L J 1753 (1989).

A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law. *Mollett* v *Taylor*, 197 Mich App 328, 344; 494 NW2d 832 (1992). In order to establish such a claim against a municipality or an agency thereof, the plaintiff must show that a policy or custom tantamount to a deliberate indifference for the constitutional rights of others actually caused the violation. *Canton* v *Harris*, 489 US 378, 381; 109 S Ct 1197; 103 L Ed 2d 412 (1989); *Monell*, *supra* at 691 and n 5; *York*, *supra* at 758. Our Supreme Court has held that deliberate indifference requires something more than mere negligence. *York*, *supra* at 757 (relying on *Estelle* v *Gamble*, 429 US 97, 104; 97 S Ct 285; 50 L Ed 2d 251 [1976], reh den 429 US 1066 [1977]).

Defendant's first contention is that plaintiffs failed to state a claim under § 1983 because Davis was acting outside the scope of his employment and, thus, not under color of state law when he shot the victims. It is true that in order to impose liability there must be deprivation under color of state law. *Adickes* v *S H Kress & Co*, 398 US 144, 150; 90 S Ct 1598; 26 L Ed 2d 142 (1970). However, defendant's argument that Davis was not acting under color of state law when he shot the victims is not dispositive of the claim against defendant.

Defendant is correct that, ultimately, plaintiffs' alleged violations resulted from Davis' shooting the victims while off duty. However, Davis was already dismissed from the suit and was not named as a defendant in the § 1983 action. Instead, plaintiffs' theory of recovery

under § 1983 was premised upon the assertion that Davis' conduct was directly attributable to the policies adopted or not adopted by defendant. Specifically, plaintiffs' claim was based on the notion that defendant should have recognized Davis' propensity for violence and should have discharged him from his position as a deputy or at least taken away his service revolver.

A recent federal decision offers guidance in this regard. In *Gibson* v *Chicago*, 910 F2d 1510 (CA 7, 1990), a police officer who had been declared unfit for duty and stripped of his powers as an officer shot and killed Gibson with his department-issued revolver. The federal appeals court concluded that it was proper for the trial court to summarily dismiss the police officer from the § 1983 action because he was not acting under color of state law when he shot Gibson. *Id.* at 1519. Nonetheless, the court reversed the trial court's decision to summarily dismiss the City of Chicago from the § 1983 action because the plaintiff had alleged that the city had adopted policies that also contributed to the violations. The court concluded that there were sufficient factual allegations in the plaintiff's complaint to survive summary disposition even though it was clear that the police officer was acting without lawful authority when the shooting occurred. *Id.* at 1519-1523. See also *Stoneking* v *Bradford Area School Dist*, 882 F2d 720 (CA 3, 1989), cert den sub nom *Smith* v *Stoneking*, 493 US 1044 (1990).

As in *Gibson*, plaintiffs' claim against defendant is based upon defendant's formulation of policy regarding the operation of the department and supervision of officers. Defendant does not, and indeed cannot, argue that the formulation of policy within the department is done outside the color of state law. See *Gibson*, *supra* at 1519 ("[T]he municipality itself is the state actor and its action in maintaining the alleged policy at issue supplies the 'color of law' requirement under § 1983."). Therefore, we agree with plaintiffs that defendant's assertion that Davis was not acting under color of state

law does not automatically imply that defendant is absolved from § 1983 liability. We do not believe that it is appropriate to mesh the "color of law" issue with the causation issue. Accordingly, while we agree with defendant's argument that the violations asserted by plaintiffs were not *caused by the policies* adopted by defendant, we address that argument separately. For purposes of addressing the "color of law" issue, we assume that the policies caused the violations at issue. See *Stengel* v *Belcher*, 522 F2d 438, 441 (CA 6, 1975). But see *Bonsignore* v *New York*, 683 F2d 635 (CA 2, 1982).

Defendant's next argument is that the court should have granted a directed verdict or judgment notwithstanding the verdict because plaintiffs, as a matter of law, failed to present sufficient evidence to support a cause of action under § 1983 against the department. At the conclusion of plaintiffs' proofs, defendant moved for a directed verdict and, following the verdict, defendant moved for a judgment notwithstanding the verdict. The court denied both motions.

In evaluating a directed verdict or a judgment notwithstanding the verdict, we are obligated to consider the evidence in a light most favorable to the nonmoving party. *Bradley* v *Philip Morris, Inc (On Remand)*, 199 Mich App 194, 197; 501 NW2d 246 (1993). If the evidence is such that reasonable minds could differ, then judgment notwithstanding the verdict is improper. *Constantineau* v *DCI Food Equipment, Inc*, 195 Mich App 511, 515; 491 NW2d 262 (1992). In this case, considering the evidence presented in a light most favorable to plaintiffs, we are persuaded that the record, as a matter of law, was insufficient to support a conclusion that reasonable minds could differ regarding whether plaintiffs suffered a § 1983 violation caused by a policy of indifference adopted by defendant. Accordingly, we reverse the verdict in favor of plaintiffs and remand for entry of judgment in favor of defendant.

Perhaps as much as any area of § 1983 jurisprudence, the liability attached in conjunction with a municipal policy or custom has created confusion and controversy in the courts. *Shuck*, *supra* at 1753-1754. In *Canton*, *supra*, the Supreme Court attempted to clarify the parameters of policy-related § 1983 liability, this time in the context of a municipality's failure to adequately train its police officers. *Canton*, *supra* at 382. The Court acknowledged that there are situations where a municipality's failure to train its employees can provide a basis for liability under § 1983. *Id.* at 387. Recognizing the direct causal connection that must exist between the policy or failure to train and the violation, the Court concluded that the failure to train must reflect a "'deliberate' or 'conscious' choice" to follow a certain course of action that results in a violation. *Id.* at 389. The Court further stated that the plaintiff must demonstrate that the need for training is so obvious, and the inadequacy so likely to cause a violation, that an inference of deliberate indifference may be made. *Id.* at 390; *Barber* v *Salem*, 953 F2d 232, 236 (CA 6, 1992).

In *Oklahoma City* v *Tuttle*, 471 US 808, 824; 105 S Ct 2427; 85 L Ed 2d 791 (1985), Justice Rehnquist (joined by three other justices), wrote:

> But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

In a footnote, Justice Rehnquist went on to suggest that there must be an "affirmative link" between the alleged training inadequacies and the violation at

issue before liability could be found. *Id.* at n 8. While not all federal courts have expressly adopted the "affirmative link" requirement, the Sixth Circuit has cited it with approval. See *Lewis* v *Irvine*, 899 F2d 451, 456 (CA 6, 1990). Regardless of how the causation element is described, it is clear that there must be some connection between the failure to train and the violation that permits an inference of deliberate indifference. *Collins*, 112 S Ct 1068.

Just as our Supreme Court applied the *Canton* "deliberate indifference" standard to a deprivation of rights in the context of inmate suicide, *York*, *supra* at 759-760, we believe that liability for an officer's off-duty conduct that results in death or bodily injury to citizenry may only be imposed where that officer's conduct is directly related to a policy, or lack of policy, adopted, or not adopted, with deliberate indifference to the rights of citizens. Accordingly, no § 1983 liability should be imposed where the department's policy or lack of policy merely reflects a negligent failure to train or supervise its employees. *Id.*

Given the conclusion that the need for training or other department action must be obvious, *Canton*, *supra* at 390, we believe that there must be some knowledge on the part of the defendant that an off-duty officer is likely to commit a violation and, yet, the defendant fails to take steps to prevent that officer from so doing. *York*, *supra* at 757 ("Deliberate indifference contemplates knowledge, actual or constructive, and a conscious disregard of a *known* danger." [emphasis supplied].); *Hays* v *Jefferson Co*, 668 F2d 869, 874 (CA 6, 1982). It is against this backdrop that we turn to the allegations of § 1983 liability in this case.

Essentially, plaintiffs relied upon four separate areas of department policy or inaction in asserting their claims for violation of § 1983. First, plaintiffs claimed

that defendant failed to train and supervise employees in the use and control of their department-issued weapons. As part of this assertion, plaintiffs offered substantial proofs regarding defendant's twenty-four-hour duty policy, during which deputies were to carry their service revolvers. Second, plaintiffs claimed that defendant failed to provide adequate psychological and social counseling programs specific to the unique stress suffered by police officers. Third, plaintiffs claimed that defendant permitted, encouraged, or otherwise failed to disallow a departmental "code of silence" that interfered with the ability to properly monitor and correct misconduct of departmental employees. Finally, plaintiffs claimed that defendant failed to adequately supervise and select employees through the use of periodic written evaluations and other screening methods.

Plaintiffs relied on specific instances of alleged "misconduct" committed by Davis, including but not limited to the following: (1) that Davis received a reckless driving ticket before he was hired; (2) that Davis was seen coming out of the kitchen of the Detroit House of Corrections with blood on his hands and pants, which Davis explained as chicken blood; (3) that Davis intervened in a fight between a couple in a restaurant while he was off duty; (4) that Davis was seen by a deputy entering an inmate's cell and that the deputy heard sounds indicative of the prisoner being beaten; (5) that a deputy noticed what appeared to be a bullet hole in his locker and briefcase and that Davis offered to pay for the damage, suggesting that Davis was responsible for discharging his weapon in the locker room; (6) that, after an inmate punched Davis, the officers had to separate Davis from the inmate to keep him from retaliating; (7) that a deputy saw Davis talking to another deputy in the cafeteria and subsequently saw Davis take his gun out of his holster and place it against the deputy; (8) that a deputy saw Davis threaten to beat Diana if she did not hand over his paycheck; and (9) that Davis

while on county property was intoxicated and apparently ran his motorcycle into a brick wall.

Significantly, the incidents mentioned above were, for the most part, admittedly never reported through the chain of command, and each person responsible for disciplining Davis testified that they had no knowledge of the alleged misconduct. Moreover, the incidents addressed above (and the other less significant incidents presented at trial) took place over an extended period spanning the course of Davis' eight-year career. To the extent that Davis inflicted physical abuse on Diana while off duty, she admitted that she did not tell her superiors at the department about the abuse because she was afraid it would adversely affect her position with the department and possibly cost Davis his job. She admitted that no one in the department left her with that impression. Diana further testified that the only time she remembered discussing the abuse was with a friend in strict confidence. Most of the testimony, including that of plaintiffs' expert, suggested that deputies only had a duty to report personal problems when those problems adversely affected a deputy's work.

Even if we were to take as fact that Davis' activity before the night of the shooting should have been reported, there is nothing in the record to suggest that defendant dissuaded or furthered the failure of the deputies to report the activity. Almost without exception, employees and administrators within the department testified that the so-called code of silence was in no way a policy of the office. In fact, the testimony suggested that defendant had adopted training procecures and informal directives to supervisors to infiltrate and break down any barriers that might exist between themselves and the deputies for whom they were responsible. Absent some evidence that the department deliberately furthered the code of silence, or was consciously indifferent to its existence, it cannot be said to

be a departmental policy. On this record, there is no such evidence.

Furthermore, in this case, we perceive no link between the tragic events that occurred on september 18, 1983, and defendant's alleged failure to train, supervise, or otherwise screen its employees. Assuming, arguendo, that defendant's alleged failure to train and supervise amounted to a policy of deliberate indifference (an assumption we espressly reject on the basis of the evidence presented), we are still not persuaded that the violations that took place were caused by those policies. All the evidence suggests that the violations were caused by personal differences between Davis and his wife. Davis was not acting in the course of his duties as a deputy sheriff and was not acting in furtherance of departmental goals. In fact, the only significant relationship that existed between the defendant and the incident was that Davis and his wife were departmental employees and that Davis' gun was sanctioned by the department. On this record, there is simply not enough evidence to suggest that defendant's failure to train, supervise, or provide specific services to employees was the cause of the violations at hand.

Alternatively, and as an independent basis for reversal, even if we conclude that the action or inaction of defendant with respect to supervision and retention of employees and operation of the department constituted a policy that was the moving force behind the violations the plaintiffs suffered, we cannot conclude that those policies amounted to "deliberate indifference." Rather, we are persuaded that each of the failings alleged to exist within the department amounted to, at most, mere negligence. See *Pembaur* v *Cincinnati*, 475 US 469, 483; 106 S Ct 1292; 89 L Ed 2d 452 (1986).

With regard to the screening of applicants and psychological testing, uncontroverted testimony established that some screening was done and that background investigations were conducted on all appli-

cants. With regard to the assertion that defendant lacked psychological and sociological support services, uncontroverted testimony established that general county-wide programs were in existence since Davis' retention as an employee. With regard to the periodic written evaluations, uncontroverted testimony established that supervisors conducted on-site evaluations day to day. Finally, with regard to the allegations that there existed a code of silence within the department, the uncontroverted testimony established that it was not the policy of the department to permit such activity. In fact, much of the testimony of the supervisors and the training personnel suggested that every possible effort to break the code of silence was undertaken. Under the circumstances, all of the allegations amount to, at worst, negligence, which is an insufficient degree of culpability for imposition of liability under § 1983. *York*, *supra* at 757.

Having concluded that the record, when viewed in a light most favorable to plaintiffs, was insufficient as a matter of law to support a claim for damages under § 1983, we now turn to those issues raised by plaintiffs on cross appeal to determine whether a new trial is warranted.

Initially, plaintiffs named Wayne County as a defendant in this matter, arguing common-law negligence as a theory of recovery. However, as stated above, Wayne County was dismissed on the basis of the doctrine of governmental immunity. On several occasions, plaintiffs moved to add Wayne County as a defendant to the § 1983 action, relying on *Rushing* v *Wayne Co*, 436 Mich 247, 259-260; 462 NW2d 23 (1990), cert den 111 S Ct 1310 (1991). On appeal, defendant concedes that Wayne County would have been a proper defendant in relation to the § 1983 claim. However, inasmuch as we have concluded that the record was insufficient to support a § 1983 claim, the question whether Wayne County may also be held liable on this theory is moot because there

are no specific allegations of policy-related deliberate indifference attributable to the county.

In the midst of the litigation, plaintiffs also sought to add a count against defendant based upon violations of the Michigan Constitution, citing *Smith* v *Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), reh den 429 Mich 1207 (1987), aff'd sub nom *Will* v *Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). While it is true that our Supreme Court recognized that a cause of action for violation of the Michigan Constitution existed in theory, the Court was unable to articulate what constitutes such a claim.[4] In this case, having concluded that the actions of defendant were not the cause of whatever violations may have occurred, the question whether a claim under the state constitution exists independently of this § 1983 claim is also moot.

Plaintiffs next argue that the court erred in refusing to allow former Wayne County Sheriff William Lucas to be treated as an adverse witness under MCL 600.2161; MSA 27A.2161.[5] The purpose of the "adverse witness" statute is to permit the free cross-examination of adverse parties that are called as witnesses by the opposing party. *Shields* v *Reddo*, 432 Mich 761, 779; 443 NW2d 145 (1989). In this case, Lucas was no longer employed in the Wayne County Sheriff's Department and was not an agent for that entity at the time the alleged violations took place. While it is true that Lucas was a Wayne County executive at the time the incident at issue occurred, Wayne County was dismissed as a party defendant before the trial. Accordingly, the

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4 At least four justices of the Court, in a memorandum opinion, agreed that a claim for damages against the state arising from a violation of the Michigan Constitution by the state may be recognized. *Smith*, *supra* at 544.

5 This issue, and the one that follows, were not specifically raised in plaintffs' brief on cross appeal. Rather, the issues were raised in plaintiffs' responsive brief.

adverse witness statute did not apply to Lucas because he was not an agent or employee of a defendant at the time of the occurrence. *Thompson* v *Essex Wire Co*, 27 Mich App 516, 530; 183 NW2d 818 (1970).

In any event, the decision to allow cross-examination under the "adverse witness" statute is left to the trial court's discretion. *Id.* Even if the statute applied to Lucas, plaintiffs are unable to point to anything that would have been admissible under the statute. Plaintiffs' request to examine Lucas regarding prior cases brought against defendant for violation of inmates' constitutional rights had little or no relevance to the case at hand.[6] Plaintiffs examined Lucas at length regarding his recollection of policies and procedures adopted when he was the sheriff. For the most part, Lucas was unable to recall most of the policy decisions made during his tenure as Wayne County Sheriff. No amount of cross-examination under the "adverse witness" statute would have made Lucas remember those events. Accordingly, the trial court did not abuse its discretion in denying plaintffs' request to examine Lucas under the statute.

Finally, plaintiffs claim that the trial court erred in excluding the testimony of a suspect who was allegedly mistreated by Davis. A trial court's decision to admit evidence is within its sound discretion and will not be reversed absent an abuse of that discretion. *Price* v *Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). In plaintiffs' offer of proof, the suspect stated that he had been arrested by Davis for reckless driving and was subsequently beaten by other deputies. How-

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6 Plaintiffs requested that they be permitted to examine Lucas and Ficano regarding *Marchese* v *Lucas*, 758 F2d 181 (CA 6, 1985), and *Jail Inmates* v *Wayne County Executive*, 178 Mich App 634; 444 NW2d 549 (1989). These cases were brought against the department for violations of inmates' Eighth Amendment rights and were specific to the physical conditions in the jail. Their relevance in regard to the lack of control that defendant exerted over its employees is questionable.

ever, the suspect was unable to positively identify Davis as being responsible for the beating because he was transported to the station by the other deputies. On the basis of the offer of proof, the court concluded that the testimony of the suspect was irrelevant because he could not establish any wrongdoing on the part of Davis that would be attributable to the department. We cannot say that the court abused its discretion in this regard.

Having concluded that the trial court did not err in the manner in which trial was conducted, and having concluded that the record was insufficient as a matter of law to support plaintiffs' claim under § 1983, plaintiffs' arguments related to additur and to costs and attorney fees are moot. We recognize the tragic circumstances underlying the claims made by plaintiffs in this case. However, we are not ready to impose monetary liability on municipalities or other government agencies for employee conduct that occurs outside the scope of employment unless that conduct is very clearly motivated by official policies or customs to which the employee is expected to adhere. Accordingly, the verdict in favor of plaintiffs is reversed, and the cause is remanded for entry of judgment in favor of defendant.

Reversed and remanded for further proceedings consistent with this opinion.

ORDER

(State of Michigan — Circuit Court — County of Wayne)

(Dated December 17, 1986)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a Minor and MARC ALEXANDER DAVIS, a Minor; and TODD [*sic*] A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs, v MARC DAVIS and THE COUNTY OF WAYNE, a Municipal corporation, and ROBERT FICANO, Sheriff of Wayne County, Jointly and Severally, Defendants — Circuit Court No. 84-419 385 NO; HON. PATRICK J. DUGGAN)

JOHN SHUREB (P24129), Attorney for Plaintiffs,
18518 Farmington Road, Livonia, Michigan 48152,
(313) 471-5077;
JOHN D. O'HAIR (P18432), MARY S. ROWAN (P24358),
Attorneys for Defendants Wayne County and Ficano,
701 City-County Building, Detroit, Michigan 48226,
(313) 224-5030;
PAUL J. MANION (P17049), Attorney for Defendant MARC DAVIS, 1000 First Federal Bldg., Detroit, Michigan 48226;
CHARLES GRIFFITHS (P28065), 30903 Northwestern Hwy.,
P.O. Box 3040, Farmington Hills, MI 48018.

At a session of said court, held in the City of Detroit, County of Wayne, State of Michigan, on DECEMBER 17, 1986.

Present: HON. PATRICK J. DUGGAN,
CIRCUIT COURT JUDGE.

This matter having been brought before this Honorable Court on December 12, 1986, and the Court being fully advised of the merits of the case through briefs and oral argument, orders as follows:

THAT IT IS HEREBY ORDERED AND ADJUDGED that all claims (Count III of Plaintiff's First Amended Complaint) against the County of Wayne, are hereby dismissed.

THAT, Plaintiff is permitted to amend Count IV (of the First Amended Complaint) in regard to the Wayne County Sheriff only (42 USC § 1983), by January 7, 1987.

/s/ HON. PATRICK J. DUGGAN
CIRCUIT COURT JUDGE

(Certification Omitted)

ORDER DENYING SUMMARY DISPOSITION

(State of Michigan — Circuit Court — County of Wayne)

(Dated September 16, 1987)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a Minor and MARC ALEXANDER DAVIS, a Minor; and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs, v. MARC DAVIS and THE COUNTY OF WAYNE, a Municipal corporation, and ROBERT FICANO, Sheriff of Wayne County, Jointly and Severally, Defendants — Case No. 84-419-385-NO; HON. J. PHILLIP JOURDAN)

ROBERT HORVATH (P27633), Attorney for Plaintiffs, One Kennedy Square, Ste. 1805, Detroit, Michigan 48226, (313) 964-0020;

HUGH M. DAVIS, JR. (P12555), Attorney for Plaintiffs, 1051 Penobscot Building, Detroit, Michigan 48226, (313) 961-2255;

PAUL J. MANION (P17049), Attorney for Defendant MARC DAVIS, 2300 Buhl Building, Detroit, Michigan 48226, (313) 965-6100;

SAMUEL A. TURNER (P21635), Wayne County Corporation Counsel, MARY S. ROWAN (P24358), Attorneys for Defendant FICANO, 701 City-County Building, Detroit, Michigan 48226, (313) 224-5030.

At a session of said Court, held in the Lafayette Building at Detroit, Michigan, on SEPTEMBER 16*, 1987.

Present: HON. PHILLIP JOURDAN,
CIRCUIT COURT JUDGE.

This matter, having come before the Court on the Defendant, Sheriff Ficano's, Motion for Summary Dispo-

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*[*Printer's Note:* **Date as stamped; original typed date of September 11 is crossed-out.**]

sition, a hearing having been held and the Court being advised in the premises;

IT IS HEREBY ORDERED that Defendant Sheriff's Motion for Summary Disposition, based on Qualified Immunity to Plaintiff's 42 USCA 1983 claims, is hereby denied for the reasons stated on the record.

FURTHER, IT IS ORDERED that Defendant Sheriff's Motion for Summary Disposition, based on "Color of Law" to Plaintiff's 42 USCA 1983 claims, is hereby denied (Motion heard on 7-17-87).

/s/ J. PHILLIP JOURDAN
Circuit Court Judge

/s/ HUGH M. DAVIS, JR.
Attorney for Plaintiffs

/s/ ROBERT HORVATH
Attorney for Plaintiffs

/s/ MARY S. ROWAN
Attorney for Defendant FICANO

/s/ NATHAN M. PARDI
Attorney for Defendant FICANO

CERTIFICATE AND OPINION APPROVING PARTIAL SETTLEMENT, ATTORNEY FEES AND REIMBURSEMENT OF COSTS AND ORDERING DISTRIBUTION OF SETTLEMENT PROCEEDS

(State of Michigan — Circuit Court — County of Wayne)

(Dated March 18, 1988)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a Minor and MARC ALEXANDER DAVIS, a Minor; and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs, vs. MARC DAVIS and THE COUNTY OF WAYNE, a Municipal corporation; ROBERT FICANO, Sheriff of Wayne County, Jointly and Severally, Defendants — Case No. 84-419 385 NO; HON. THOMAS J. FOLEY)

ROBERT HORVATH (P27633), Attorney for Plaintiffs, One Kennedy Square, Ste. 1805, Detroit, Michigan 48226, (313) 964-0020;

HUGH M. DAVIS, JR. (P12555), Attorney for Plaintiffs, 1051 Penobscot Building, Detroit, Michigan 48226, (313) 961-2255;

JOHN M. SHUREB (P24129), Of Counsel, Attorney for Plaintiffs, 18518 Farmington Road, Livonia, Michigan 48152, (313) 471-5077;

PAUL J. MANION (P17049), Attorney for Defendant MARC DAVIS, 2300 Buhl Building, Detroit, Michigan 48226, (313) 965-6100;

SAMUEL A. TURNER (P21635), Wayne County Corporation Counsel, MARY S. ROWAN (P24358), Attorneys for Defendant FICANO, Wayne County Building, 500 Randolph, Detroit, Michigan 48226, (313) 224-5030.

At a session of said Court, held in the City-County Building, Detroit, Michigan, on MARCH 18, 1989.

Present: [*Illegible*], CIRCUIT COURT JUDGE.

This Court does hereby certify to the Wayne County Probate Court that on the 24th day of September, 1987,

a settlement was approved by this Court in an action for the wrongful death of Kimberly Sue Wilson, deceased, against the Defendant, MARC DAVIS, Only.

Said Probate Court is further advised that pursuant to the Settlement Agreement the settlement proceeds payable on behalf of Defendant, MARC DAVIS, by one of his liability insurance companies by virtue of a Decision of the Michigan Court of Appeals affirming a Circuit Court Decision finding no coverage for said Defendant, MARC DAVIS, under their liability insurance policy, that no portion of said settlement proceeds be payable to the Estate of Kimberly Sue Wilson; any damages sustained by said Estate to await the outcome of the still pending litigation in the above entitled action against the County of Wayne and/or Robert Ficano, Sheriff of Wayne County and of the declaratory action involving Allstate Insurance Company presently pending in the Federal District Court.

IT IS FURTHER CERTIFIED that reimbursement of actual litigation costs incurred by the attorney for said Plaintiffs in the amount of $868.97 and attorney fees not exceeding thirty-three and one-third (33⅓%) percent after reimbursement of said costs and distribution of the remaining settlement proceeds to the individual Plaintiffs, DIANA DAVIS and TOD A. WILSON, individually, one-half (½) each.

IT IS FURTHER ORDERED that distribution of said settlement proceeds to the Plaintiffs, DIANA DAVIS, individually, and TOD A. WILSON, individually, with no payment to the minor Plaintiffs, Danielle Yvette Marie Davis and Marc Alexander Davis or the Estate of Kimberly Sue Wilson, deceased, of the Partial Settlement Proceeds be and the same hereby is ORDERED AND APPROVED.

/s/ [*Illegible*]
CIRCUIT COURT JUDGE

JUDGMENT

(State of Michigan — Circuit Court — County of Wayne)

(Dated June 13, 1989)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a Minor and MARC ALEXANDER DAVIS, a Minor; and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs, -vs- MARC DAVIS and the COUNTY OF WAYNE, a Municipal corporation, and ROBERT FICANO, Sheriff of Wayne County, Jointly and Severally, Defendant — Case No. 84-419385 NO; Honorable J. Phillip Jourdan)

ROBERT HORVATH (P27633), Attorney for Plaintiffs, 25835 Southfield Road, Ste. 101, Southfield, Michigan 48075-1827, (313) 424-8855;
HUGH M. DAVIS, JR. (P12555), Attorney for Plaintiffs, 3149 Penobscot Building, Detroit, Michigan 48226;
PAUL J. MANION (P17049), Attorney for Defendant, Davis;
MARY M. NASSAR (P21635), MARY S. ROWAN (P24358), Wayne County Corporation Counsel, Attorney for Defendants, County of Wayne and Robert Ficano.

At a session of said court held in the City County Building at Detroit, Michigan on JUNE 13, 1989.

Present: Hon. J. Phillip Jourdan,
Circuit Court Judge

This matter having been conducted as a Jury trial, the Jury having rendered a verdict in favor of Plaintiffs on May 18, 1989, and the Plaintiffs having filed a Motion For Entry Of Judgment;

IT IS HEREBY ORDERED that Judgment is entered in favor of the Plaintiffs in the following amounts:

Tod Wilson:	$ 50,000.00
Estate of Kimberly Wilson	$651,752.00
Diana Davis	$803,416.00

Yvette Maris Davis	-0-
Marc Alexander Davis	-0-

Interest at 12% based on the filing date of the Complaint (June 26, 1984) has accrued and is payable; costs and attorney fees are to be added after further hearing conducted on July 14, 1989.

/s/ J. PHILLIP JOURDAN
Circuit Court Judge

Notice of Hearing on entry of
the above Order is waived.

/s/ Mary S. Rowan (P24358)
Attorney for Defendant
600 Randolph, 2nd Floor
Detroit, MI 48226

(Certification Omitted)

ORDER DENYING NEW TRIAL

(State of Michigan — 3rd Judicial Court — County of Wayne)

(Dated October 13, 1989)

REQUEST FOR A HEARING ON A MOTION (PRÆCIPE) ORDER/JUDGMENT

PLAINTIFF NAME(S): *DIANA DAVIS, ET AL.*
vs. CASE NO. 84 419385 NO
DEFENDANT NAME(S): *MARC DAVIS, SHERIFF FICANO, ET AL.*

PLAINTIFF'S ATTORNEY, BAR NO., ADDRESS, AND TELEPHONE NO.: *ROBERT HORVATH (P27633), 25835 Southfield Rd., Suite 101, Southfield, MI 48075, (313) 424-8855*

DEFENDANT'S ATTORNEY, BAR NO., ADDRESS AND TELEPHONE NO.: *MARY M. NASSAR (P34439), MARY S. ROWAN (P24358), 600 Randolph, Second Floor, Detroit, MI 48226, (313) 224-5030*

1. Motion Title: *MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE A NEW TRIAL*

2. Moving Party: *SHERIFF ROBERT FICANO*
   Telephone No.: *(313) 224-5030*

3. Please place on the motion calendar for:
   Judge: *HON. J. PHILLIP JOURDAN (P-22989)*
   Date: *August 18, 1989* Time: *9:00 a.m.*
   Adj. to: *October 13, 1989*

4. I certify that I have made personal contact with _____ regarding concurrence in relief sought in this motion and that concurrence has been denied or that I have made reasonable concurrence with motion.
   Date: *June 28, 1989*
   Attorney: *Mary M. Nassar* Bar No.: *(P34439)*

ORDER/JUDGMENT

IT IS ORDERED THAT THIS MOTION IS: *DENIED*

/s/ *J. PHILLIP JOURDAN*, CIRCUIT JUDGE

ORDER

(State of Michigan — Court of Appeals)

(Dated December 15, 1993)

(Diana Davis v Marc Davis — Docket # 122594; L.C. # 84-419385-NO)

Martin M. Doctoroff, Presiding Judge;
Michael J. Kelly, Roman S. Gribb, Judges.

The Court orders that the motion for rehearing is DENIED for lack of merit in the grounds presented.

(Certification Omitted)

ORDER

(State of Michigan — Supreme Court)

(Entered November 16, 1994)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs-Appellants, Cross-Appellees, v MARC DAVIS, THE COUNTY OF WAYNE, and SHERIFF OF WAYNE COUNTY, Defendants-Appellees, Cross-Appellants, and SECOND INJURY FUND, Defendant — SC: 98819; CoA: 122594; LC: 84-419385-NO)

Michael F. Cavanagh, Chief Justice;
Charles L. Levin, James H. Brickley, Patricia J. Boyle Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

On order of the Court, the delayed application for leave to appeal and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(Certification Omitted)

ORDER

(State of Michigan — Supreme Court)

(Entered January 31, 1995)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs-Appellants, Cross-Appellees, v MARC DAVIS, THE COUNTY OF WAYNE, and SHERIFF OF WAYNE COUNTY, Defendants-Appellees, Cross-Appellants, and SECOND INJURY FUND, Defendant — SC: 98819; COA: 122594; LC: 84-419385-NO)

James H. Brickley, Chief Justice;
Charles L. Levin, Michael F. Cavanagh, Patricia J. Boyle, Dorothy Comstock Riley, Conrad L. Mallett, Jr., Elizabeth A. Weaver, Justices.

On order of the Court, the motion for reconsideration of this Court's order of November 16, 1994 is considered, and it it DENIED, because it does not appear that the order was entered erroneously.

(*Certification Omitted*)

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(State of Michigan — Supreme Court)

(Filed February 9, 1994)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs-Appellants, vs. MARC DAVIS, Defendant, and THE COUNTY OF WAYNE, Defendant-Appellee, and ROBERT FICANO, SHERIFF OF WAYNE COUNTY, Defendant-Appellee, and SECOND INJURY FUND, Defendant — Supreme Court No: _____; Court of Appeals No: 122594; Wayne County Cir. No: 84-419385-NO)

ROBERT D. HORVATH, By: ROBERT D. HORVATH (P27633), Attorney for Plaintiffs, 25835 Southfield Road, Suite 101, Southfield, Michigan 48075-1827, (313) 424-8855;

HUGH M. DAVIS, JR., P.C., By: HUGH M. DAVIS (P12555), Attorney for Plaintiffs, One Kennedy Square, Ste. 1630, Detroit, Michigan 48226, (313) 961-2255;

BENDURE & THOMAS, By: MARK R. BENDURE (P23490), SIDNEY A. KLINGLER (P40862), Attorneys of Counsel for Plts., 477 East Larned, Suite 210, Detroit, Michigan 48226-4392, (313) 961-1525;

GARAN, LUCOW, MILLER, SEWARD, COOPER & BECKER, P.C., By: ROSALIND H. ROCHKIND (P23504), Attorney for Defendants, 1000 Woodbridge Street, Detroit, Michigan 48226-3412, (313) 961-8380.

(1)

INTRODUCTION

On September 18, 1983, a Garden City police officer was called to the home of Tod and Kimberly Wilson, where he found Marc "Macho" Davis[1] ("Marc") with a

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[1] **Marc had acquired the nickname "Macho" among his colleagues at the sheriff's department because of his aggressive**

(concluded on page A-29)

loaded handgun. Marc was a Wayne County Deputy Sheriff whose 8½ year career was marked by numerous acts of bizarre conduct and violence which were known to the Wayne County Sheriff's Department. When the Garden City police officer arrived, he was unable to confiscate Marc's weapon or arrest him for carrying it, because of his status as a deputy sheriff. Shortly thereafter, Marc opened fire with his service revolver, shooting his wife, Diana Davis ("Diana") (severing her spine and inflicting permanent paralysis), his sister-in-law, Kimberly Wilson (killing her), and his brother-in-law, Tod Wilson.

This suit, filed under 42 USC § 1983 against Wayne County Sheriff Ficano,[2] alleges that the Department was deliberately indifferent to the risk of death or injury presented by the continued employment of Marc and

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(*continued from page A-28*)

behavior and caustic attitude toward prisoners (Tr. 4/25/89, pp. 174-5). He was verbally abusive when there was no cause for it and tended to incite problems where there were none (Tr. 4/25/89, p. 175). His behavior was described as "arrogant, unrelenting, abrasive and arbitrary" (Tr. 4/27/89, p. 79). Marc Davis liked to direct people what to do, and would sometimes do so in an arrogant and abusive manner (Tr. 4/25/89, pp. 31-32). Marc Davis displayed this attitude toward fellow deputies and supervisors as well as prisoners (Tr. 4/25/89, p. 32). According to his partner Larry Davis, Marc Davis failed to see people as people (Tr. 4/24/89, p. 130).

[2] Sheriff Ficano has been sued in his official capacity as sheriff. *Davis* v *Wayne County Sheriff*, 201 Mich 572, 574, fn.1 (1993). The trial court refused to permit Plaintiffs to make Wayne County itself a named Defendant, a ruling which was indisputably erroneous. *Rushing* v *Wayne County*, 436 Mich 247, 260 (1990); *Davis*, 201 Mich App at 586. The technical identification of the Defendant is largely inconsequential, however, as the focus in this "official capacity" suit is on the customs and policies of the Sheriff's Department. See *Brandon* v *Holt*, 469 US 464, 471-472; 105 S Ct 873; 83 LEd 2d 878, 885 (1985); *Monell* v *Department of Social Services*, 436 US 658, 690; 98 S Ct 2018; 56 LEd 2d 611, 635, fn. 55 (1978). Accordingly, the terms "the Department" or "Sheriff's Department" will be used to identify the body whose "customs" and "policies" are in issue.

his required possession of a loaded weapon at all times. This deliberate indifference, it is claimed, was manifested by the customs and policies of the Department, which conducted no psychiatric counseling of deputies, conducted no performance reviews, provided no police-specific counselling programs for officers, discouraged reports of mis-conduct through a "code of silence", and elected to conduct no investigation or discipline of Marc Davis despite his misconduct. After an extended trial in Wayne County Circuit Court before the Hon. Phillip Jourdan, the jury returned a unanimous verdict for Plaintiffs.[3]

On appeal, the Court of Appeals reversed and remanded for entry of judgment in favor of Defendant, *Davis* v *Wayne County Sheriff*, 201 Mich App 572 (1993). In the Court's view, the evidence was insufficient to establish a *prima facie* case of § 1983 liability, 201 Mich App at 580-585. Plaintiff now seeks leave to appeal from the abrogation of the jury's verdict and asks that this Court consider and resolve the significant questions of governmental liability which this extraordinary case presents. Due to the complexity of the case, and the nature of the directed verdict issue presented, an extended discussion of the evidence relied on by Plaintiffs follows.

(2)
DAVIS FAMILY BACKGROUND FACTS

(a) Marc Davis's Employment With The Department

Marc Davis graduated from the police academy in February of 1975 and completed his probationary

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3 **The verdict awarded damages of $803,416 to Diana Davis, $651,702 to the Estate of Kimberly Wilson, $50,000 to Tod Wilson, and nothing to the Davis children. Plaintiffs cross-appealed to the Court of Appeals, taking issue with the inadequacy of the damage awards and the trial court's award of costs and attorney fees under 42 USC § 1988 and MCR 2.403. Due to its directed verdict ruling, the Court of Appeals did not address these issues. If this Court grants leave to appeal and reinstates the jury verdict, it should remand to the Court of Appeals to address these unresolved questions.**

period in April of that year (Tr. 5/9/89, p. 66).[4] Two evaluations of Marc Davis were conducted during this period (Tr. 4/24/89, pp. 18-20). That was the entirety of the formal review of Mr. Davis's fitness: the Department's policies called for no mandatory psychiatric screening of deputy candidates (Tr. 4/19/89, p. 80; Tr. 4/24/89, pp. 13, 37, 39-41, 56; Tr. 5/3/89, pp. 34-35), and no periodic written evaluations were performed after the completion of probation (Tr. 4/24/89, pp. 21, 71; Tr. 5/3/89, pp. 15-16; Tr. 5/8/89, pp. 129-131, 166-167). By the fall of 1976, one year after joining the Department, Marc separated from his first wife from whom he was divorced shortly afterwards (Tr. 5/3/89, pp. 125, 132).

(*b*) Diana Davis's Work Life

After the first child was born, Diana Davis also obtained employment with the Sheriff's Department. She began working at the Westland annex of the Wayne County jail in May of 1979 (Tr. 5/3/89, p. 150; Tr. 5/8/89, 23-24). Her classification, "Police Officer I", did not require state certification as a deputy sheriff and did not involve carrying a gun (Tr. 5/3/89, 150; Tr. 4/19/89, p. 67). Marc and Diana were often assigned to work in the same area, although they had little on-the-job contact (Tr. 5/3/89, p. 160).

In 1983, Diana finally received her orders to attend the police academy so that she could fulfill her ambition of becoming a certified police officer (Tr. 5/3/89, pp. 104-105; Tr. 5/4/89, p. 27; Tr, 5/8/89, pp. 104-105). She reported to the academy on August 1, 1983, and was

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[4] Marc was an ex-Marine who had previously been in trouble with the law for reckless driving. While Plaintiffs did not claim that these events made him *ipso facto* unfit to be hired at the outset, they were indicative of potential trouble. Military training, which teaches killing, is contrary to what is expected of a civilian police force (Tr. 5/8/89, pp. 21-22, 75-77). Reckless driving may reflect a lack of self restraint and respect for the limits of law.

scheduled to graduate four weeks after the shooting (Tr. 5/4/89, pp. 27, 77).[5]

(c) The Marriage

Marc Davis and Diana Davis were married on May 28, 1977 (Tr. 5/3/89, pp. 125, 134; Tr. 5/8/89, p. 21). They had two children, Danielle (born May 20, 1978) and Marc (born September 21, 1981) (Tr. 5/3/89, p. 140). Within hours of the wedding, at the reception, Marc Davis became verbally abusive when the band declined his request to play the "Marine Corps Hymn" (Tr. 5/8/89, p. 85). On their honeymoon, Marc Davis struck Diana (Tr. 5/3/89, pp. 136, 138; Tr. 5/8/89, p. 35). Later during the marriage, Marc Davis would rape Diana at gunpoint (Tr. 5/4/89, pp. 66-67; Tr. 5/8/89, pp. 25-32), choke her into unconsciousness (Tr. 5/3/89, pp. 142-143), and beat her.

In May of 1983, Marc Davis struck Diana in front of their children (Tr. 5/3/89, pp. 139-140; Tr. 5/4/89, p. 57). Diana moved out and, after a brief stay with her father, moved in with her step-sister, Kimberly Wilson, Kimberly's husband, Tod, and the two Wilson children (Tr. 5/4/89, p. 58; Tr. 5/8/89, p. 39). Marc and Diana agreed that the children would move in with Diana (Tr. 5/4/89, p. 58). A few days before the shooting, they agreed that they would divorce and that Diana would have custody of the children (Tr. 5/4/89, pp. 59-60).

(3)
MARC DAVIS'S PATTERNS
OF MENTAL INSTABILITY AND VIOLENCE.

Marc Davis was a very abusive, caustic deputy who tended to cause problems. The evidence regarding Marc's personality, as recognized by other Sheriff's Department personnel, is summarized in footnote 1,

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5 While she was in the Academy, Diana Davis was permitted to have a gun but not to carry it on her person outside the Academy. She therefore carried her weapon in her trunk in order to transport it to and from the Academy.

infra. He was an arrogant, cocky and abrasive deputy. He was very abusive, the only deputy on the Department nicknamed "Macho" (Tr. 4/26/89, p. 129).

Towards prisoners, Marc was an abusive, intimidating, and insulting deputy (Tr. 4/25/89, pp. 174-175). He was arrogant and abusive to fellow deputies and supervisors at times (Tr. 4/25/89, p. 32).

Over and above Mr. Davis's "Macho" reputation and his general abusive attitude toward inmates and fellow employees, evidence was presented regarding a number of specific incidents indicative of the violence and mental condition of Mr. Davis. It was Plaintiffs' position that this background provided the Sheriff's Department with knowledge of his mental instability and penchant for violence.

(*a*) Violence And Mental Instability Generally

(*i*) Abuse Of Inmates

On one occasion, Marc attacked a prisoner who had been brought down from one of the floors in the jail and who was placed in the bullpen area for isolation (Tr. 4/25/89, pp. 177-178). In this instance, deputy Teresa Vasquez testified, "Officer Davis opened the cell up and proceeded to go inside the cell and beat the prisoner" (Tr. 4/25/89, p. 178). Vasquez testified that this type of conduct was tolerated by the command officers:

> "THE WITNESS: Normally if there was a command officer available or on the scene, nothing would happen.
>
> Q. (By Mr. Horvath): Why would nothing happen, normally?
>
> A. Because it was up to the command officer to stop it.
>
> Q. Any other — so you're saying that the practice of the Department was to tolerate this kind of conduct, is that correct?
>
> A. Yes, sir." (Tr. 4/25/89, pp. 179-180).

On another occasion, Marc, in an extremely agitated state, attempted to get at a prisoner and expressed his intent to beat him up (Tr. 4/25/89, pp. 32-34). The incident was known to supervisory personnel. Davis's fellow deputy, William Wensko, was ordered by his sergeant not to let Marc Davis "in any way, shape or form encounter the prisoner again" (Tr. 4/25/89, p. 32). Lieutenant Bryant was there for at least part of this incident (Tr. 4/25/89, p. 34).

On February 13, 1980, Peter Wilson, the Wayne County Jail Administrator, submitted a complaint to the Internal Affairs Department regarding a petition filed by fifteen jail inmates against Marc Davis, alleging demeaning and unprofessional conduct on his part (Trial Exhibit 16, attached Exhibit C). The jail administrator asked Internal Affairs to "please investigate this matter thoroughly and report the results as soon as possible" (Exhibit C, p. 3). Sergeant Reed testified that a complaint by a group of prisoners such as this was "not the norm", and was different enough that it should attract the attention of the department (Tr. 4/27/89, pp. 88-89). Over eight years after the jail administrator's written request for investigation of Marc Davis's conduct, Internal Affairs reported on August 26, 1988 that "the file did not include any findings of fact as to the allegations" (Exhibit C p. 9). There was no investigation or discipline for Davis's misconduct toward inmates.

(*ii*) On-Duty Misconduct With A Gun

In another incident of serious misconduct, Marc Davis pulled his gun on another deputy, placing the barrel against the victim's butt (Tr. 4/25/89, p. 35). Deputy Wensko, who witnessed this incident, testified that the officers did not appear to be "kidding around" (Tr. 4/25/89, p. 60). No action was taken.[6]

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6 **The custom of ignoring gun play was confirmed by Deputy Teresa Vasquez, who testified to a similar instance in which another deputy (not Marc Davis) pulled a gun on her in the presence of a command officer (Tr. 4/25/89, p. 190). No action was taken (*Id.*).**

The evidence at trial also strongly suggested that Marc Davis discharged his firearm within the deputies' locker room. Deputy Sheriff Louis Elias testified that after he observed a bullet hole in his locker, he confronted Marc Davis who voluntarily paid for Elias's briefcase which was damaged by the shot (Tr. 4/25/89, pp. 146-147). Numerous persons testified that there should be an investigation when a weapon goes off (Tr. 4/26/89, p. 138). When questioned about this matter, Dale Jurcisin testified, "If there is a [sic] incident, I am sure there is a written report" (Tr. 4/20/89, p. 48). According to Jurcisin, this is because the department would want to know why a gun went off in the deputies' locker room (Tr. 4/26/89, pp. 137-138). In fact, there was no investigation or discipline.

(*iii*) The Blood Incident

In 1975 or 1976, while working at Dehoco prison, Marc Davis came out of the kitchen with blood all over him (Tr. 5/2/89, p. 115). Davis stated he had been killing chickens with the kitchen staff (*Id.*). Kitchen patrol was not part of Davis's duties (*Id.*).

(*iv*) Off-Duty Misconduct Known To Defendant

Wayne County Deputy Sheriffs frequently gathered after duty to drink on Sheriff's property. This was known as "choir practice" and had been going on for at least 14 years before the time of trial (Tr. 4/25/89, p. 186). Supervisors were aware of the practice (Tr. 4/26/89, pp. 145, 156). During a "choir practice" session, Marc Davis rode a motorcycle up a debris-packed hill and crashed into a cement wall (Tr. 4/25/89, p. 40). Marc Davis had been drinking at the time of this incident (Tr. 4/25/89, p. 38).

In another incident of uncontrolled behavior, Marc Davis broke his hand by hitting a car windshield while off-duty in 1980 or 1981 (Tr. 5/4/89, pp. 71-72). Davis received workers' compensation for this injury (Tr. 5/4/89, p. 72).

Another incident of violent behavior by Marc Davis was brought to the attention of the Department when Belleville police officers filed a complaint after Marc was involved in an altercation between a man and a woman in a Belleville restaurant while off-duty (Tr. 5/2/89, pp. 48-49). According to the officer assigned to investigate the complaint, the matter was "just a simple write-off", that is, it was dropped because the parties involved in the altercation did not want to pursue it (Tr. 5/2/89, pp. 52-53). The complaint against Marc Davis was "written off" in this manner even though the initial complaining parties were the Bellevile police officers.

(*b*) Violence Directed To Plaintiff

In 1978, while Diana Davis was pregnant with their first child, Marc attacked her. He struck her, placed his gun to her head, and choked her to unconsciousness (Tr. 5/3/89, pp. 142-143).

In 1982 or 1983, he attacked her, threw her on the bed, and told her to disrobe at gunpoint (Tr. 5/4/89, p. 66; Tr. 5/8/89, pp. 25-32). When she declined, Marc Davis tore off her clothes and raped her (Tr. 5/4/89, pp. 66-67; Tr. 5/8/89, pp. 25-32).

In one incident of abusive behavior occurring at the jail and known to supervisory personnel, Marc Davis confronted Diana Davis and told her that if she did not give him her paycheck he was going to "beat her ass" (Tr. 5/12/89, p. 106). Deputy Claire Parnell intervened by telling Marc Davis "not today" (Tr. 5/2/89, p. 107). Parnell explained at trial that by this she meant "he was not going to jump on her with me standing there, that's what" (Tr. 5/2/89, p. 107). Parnell saw that Marc Davis was not going to leave, and therefore telephoned a command officer (Tr. 5/2/89, p. 107). The sergeant asked to speak to Marc Davis (Tr. 5/2/89, p. 107). Marc Davis spoke with the sergeant and then left the floor (Tr. 5/2/89, p. 107). No further action was taken.

Marc Davis's physical abuse of Diana Davis was known to the department but never triggered any departmental response.

Diana Davis was so badly battered that she took to wearing makeup and sunglasses to work to conceal the bruises about her face (Tr. 4/19/89, p. 108; Tr. 5/2/89, p. 104; Tr. 5/4/89, p. 119). When the bruises were still obvious, she told two other Sheriff's Department employees, Claire Parnell and Christine Dennard, that Marc was responsible (Tr. 5/4/89, pp. 72-74, 119).

Diana Davis also testified that she spoke with Sergeant Jim Reed at one time concerning the source of her injuries (Tr. 5/4/89, p. 119). He did not suggest any assistance to her (Tr. 5/4/89, pp. 119-120).[7]

Marc Davis admitted to another Deputy Sheriff, Larry Davis, that he was beating his wife. Larry Davis did not attempt to suggest to any supervisor that Marc Davis was in need of help because he felt it was "their business" (Tr. 4/24/89, p. 127). In his view, striking a spouse was "conduct unbecoming an officer" only if the spouse filed charges (Tr. 4/24/89, p. 126). If no such complaints were filed, Larry Davis stated, "then it's none of their [the department's] business" (Tr. 4/24/89, p. 126). The departmental administration operated under the same precept. Richard Stover explained that spouse abuse by a deputy might or might not be reported up the chain of command, unless a formal complaint was filed with the department by the spouse (Tr. 4/25/89, p. 18).

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7 **One reason Diana Davis refrained from more aggressively reporting Marc Davis to either his or her superiors was that she feared it would affect her job, since she had yet to complete her course work at the academy and become certified (Tr. 5/4/89, p. 120). Dale Jurcisin confirmed the reasonableness of Diana's concerns when he testified that an academy graduate's having brought criminal charges against an already certified deputy would "obviously" be considered when deciding whether the academy graduate should be accepted into deputy status (Tr. 4/19/89, p. 180).**

Additional evidence concerning the Department's knowledge that Marc Davis was beating Diana Davis is the departmental investigative report which following the shootings underlying this case. The investigative report states: "it is rumored within the department that there had been a history of violence perpetrated by Marc Davis upon Dianne [sic] Davis; that their marriage was faltering and that this was the motive for the shooting" (Trial Exhibit 55, p. 55; attached Exhibit D).

(c) Marc Davis's Mental De-Composition Shortly Before The Shooting

During the months preceding the shooting, Marc Davis was showing signs of severe stress. During August, 1983, Marc Davis was drinking on the job (Tr. 4/24/89, p. 125). During the summer of 1983, he expressed a desire to go fight in a war (Tr. 4/24/89, p. 128). Davis then enlisted in the Marine Reserves that summer in what his partner, Larry Davis, viewed as an attempt to escape reality (Tr. 4/24/89, p. 128). On one occasion, Marc Davis broke down on the job and started crying (Tr. 4/24/89, p. 128). On another occasion, Marc Davis asked Larry Davis to punch him after he had struck Diana Davis in a fight (Tr. 4/2/89, p. 131). The day before the shooting, Marc Davis split wood at Larry Davis's house until his hands bled (Tr. 4/24/89, p. 132).

On September 1, 1983, less than three weeks before the shooting, Diana Davis appeared at the police academy with a black eye and facial injuries received at the hands of Marc Davis (4/19/89, p. 108). Ms. Davis's supervisor at the academy, Ron Proudlock, questioned her and learned the source of her injuries, and personally accompanied her to the office of Sergeants Hammond and Hawkins at the Wayne County Sheriff's Department (Tr. 4/19/89, p. 116). These officers were at that time filling the position of Mr. Shannon, the director of training (Tr. 4/24/89, p. 51). Proudlock told Sergeants Hammond and Hawkins that Diana Davis had

been beaten by her husband (Tr. 4/19/89, p. 108).[8] Although spouse abuse by a deputy was nominally recognized by command officers as a problem which should cause departmental investigation and/or discipline (Tr. 4/27/89, p. 66; Tr. 4/20/89, p. 5), the record reveals no action by Hammond or Hawkins, then acting directors of training, when the beating of Diana by her husband was brought to their attention.

Despite all these incidents of aberrant conduct by Marc, the Department took no disciplinary action at all. Indeed, it conducted no evaluation or investigation. To understand how this occurred, it is necessary to understand the practices, customs, and policies which characterized the chaotic Sheriff's Department of that era. These customs, policies, and practices which led the Department to deliberately ignore the problem are the focus of this lawsuit and, in turn, the issues presented to this Court.

(4)

THE PRACTICES, CUSTOMS, AND POLICIES OF THE SHERIFF'S DEPARTMENT

The risk that a Sheriff's deputy may "snap" with catastrophic results is the product of two phenomena: the unique stresses of police work and the ready accessibility of a lethal weapon. These two realities coalesce to form the explosive potential which demands appropriate police management practices.

It was well known to high level officials within the Sheriff's Department that police officers are subject to unique types of stress (Tr. 4/19/89, p. 144). According to Dale Jurcisin, Chief of Staff of all administrative services in the Sheriff's Department, and third in the departmental hierarchy under the Sheriff and Under-

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8 **Ironically, Hammond and Hawkins at the time were coordinating and instructing a court-ordered jail training program (Tr. 4/27/89, p. 91).**

sheriff, this unique stress is due to the confrontational nature of the job involving the use of deadly force (Tr. 4/19/89, p. 144). William Lucas, who served as Wayne County Sheriff from 1969-1982, also recognized stresses unique to law enforcement (Tr. 4/20/89, p. 94). Officers have a high suicide rate, a high divorce rate and a high alcoholism rate (Tr. 4/19/89, pp. 139-140; Tr. 5/1/89, p. 18). The stresses recognized by Jurcisin and Lucas had been identified generally by the 1970's or earlier as being a significant part of management responsibility for police agencies (Tr. 4/19/89, pp. 142-143; Tr. 4/24/89, p. 22).

The gun Marc Davis used in the shootings was his department issued service revolver (Tr. 4/19/89, p. 50; Tr. 5/4/89, p. 116). He also had on his person a .357 magnum which was his on-duty gun (Tr. 5/4/89, p. 116). Anthony Shannon, Director of Training for the Wayne County Sheriff's Department, testified that officers are instructed that they are on duty 24 hours a day, and that they are instructed to keep their gun on them at all times (Tr. 4/24/89, p. 6). When officers carry a gun, they do so by virtue of their authority as police officers (Tr. 4/24/89, p. 6). Thus, Shannon agreed that the officers carry an instrument of death, with the decision-making power conferred on the officer by the state (Tr. 4/24/89, p. 23). The power to remove police powers resides exclusively with the sheriff without regard to any collective bargaining agreement (Tr. 4/25/89, p. 113). According to Chief of Staff Jurcisin, police management has a duty to make sure that an officer who is given a gun is a stable and non-reckless individual (Tr. 4/19/89, p. 168). This duty to monitor suitability does not depend on whether the officer is on or off-duty, as there is a high risk of harm to the public in either instance (Tr. 4/19/89, pp. 168-169).

In short, it was well-recognized that police officers are subject to unique stress which results in extraordinarily high rates of mental instability. At the same time, the

very persons subject to this stress are required to have ready access to lethal weapons while off duty.

(*a*) Overview Of The Sheriff's Department

During the late 1970's and early 1980's, the Sheriff's Department experienced difficult problems caused by the County's failure to provide adequate financial support. Then-Sheriff William Lucas described this time as "difficult and tumultuous" (Tr. 4/20/89, pp. 91-92). Another supervisor described the Department as being in "turmoil" during that time (Tr. 4/27/89, pp. 44-45). The Department went through periods of significant layoffs. Numerous positions were eliminated, and numerous employees were demoted (Tr. 4/27/89, p. 40).[9] As a result of the layoffs, those who were left running the Department spent a lot of time just trying to get bodies to staff the positions (Tr. 4/26/89, pp. 167-168).[10] The attitude of the supervisors was that they were just barely functioning, and could get through the day just by being there (Tr. 5/9/89, p. 97).

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9 One command officer, Richard Stover, went from being in charge of an entire division as an inspector to being a deputy (corporal) (Tr. 4/20/89, p. 156). Another officer was demoted and promoted back and forth ten times between 1976 and 1983 (Tr. 4/27/89, p. 40). Another supervisor was demoted from lieutenant to deputy, working side by side with former subordinates (Tr. 4/26/89, p. 128). In this environment, an officer who dared to report another officer's misconduct or to discipline another officer ran the risk that the object of the report or discipline would soon be the partner or superior of the person who took action.

10 These personnel policies had a number of consequences. By concentrating on simply getting available bodies to staff positions, the Department devoted its available resources to projects other than fulfilling its duty to oversee the fitness of those given guns. In the process, those available bodies worked substantial overtime, increasing their exposure to job-related stress, and losing the opportunity for recuperative leisure time. And, strapped for available manpower, the Department had no incentive to weed out misfits, as this would just exacerbate its personnel problems. Finally, this environment fostered the "code of silence" discussed *infra*, as officers beset by daily turmoil developed an "us against the world" mentality and were disinclined to increase the stress of their own job by "breaking ranks" to take action against an errant comrade.

These conditions led to a particularly acute situation in the Department where the ordinary stresses of police work multiplied. When Dale Jurcisin reviewed the department after his arrival in April, 1983, he concluded that the Department's problems were "of a bigger magnitude, there were more of them" (Tr. 4/20/89, p. 6). These stresses were evident before 1983 (Tr. 4/24/89, p. 29).

Deputy Larry Davis, Marc Davis' partner in September, 1983, noted "several incidents within the department where we have had suicide by officers, we have had officers shoot their spouses, shoot their children . . ." (Tr. 4/24/89, p. 123). Deputy Theresa Vasquez also testified to a "departmental problem" of suicides during the early 1980's (Tr. 4/25/89, pp. 170, 180). Richard Novak, Wayne County Undersheriff and second only to the Sheriff in the departmental hierarchy, stated that the Department had a 25 percent attrition rate: "25 percent go off the deep end for whatever reason, you know, between drinking or whatever, they can't handle it, you know." (Tr. 5/3/89, p. 39). Plaintiffs' expert on police administration, Fred Postill, testified that a failure rate this high was outrageous, and indicated that the department was hiring the wrong people, putting its employees in the wrong assignments, or just not supervising them at all (Tr. 5/9/89, p. 13).

The Department's problems were gravest in the Wayne County Jail facet of its operations. The Department's jail practices have been the subject of *Marchese* v *Lucas*, 758 F2d 181 (6th Cir, 1985); *Rushing* v *Wayne County*, 436 Mich 247 (1990); and *Jail Inmates* v *Wayne County Chief Executive Office*, 178 Mich App 634 (1989).

(*b*) The Lack Of Police-Specific Counseling

The appropriate management response to the problem of stress among police officers was identified

as of the 1970's; *there was a need for a police-specific psychological or psychiatric counseling program* (Tr. 4/19/89, pp. 143-144; Tr. 4/24/89, p. 22). The existence of these programs, designed to alleviate stress, recognized that it is bad for everyone if an officer is someone who is likely to engage in explosive violence (Tr. 5/1/89, p. 61).

The evidence at trial demonstrated that the need for a police-specific counseling program to aid the sheriff's deputies in dealing with the stress of the job was obvious to high level officials in the Wayne County Sheriff's Department. Sheriff Ficano himself testified that an urban sheriff's department needs a police-specific counseling program (Tr. 5/10/89, p. 62). Dale Jurcisin, third in the departmental hierarchy, testified that there was no doubt in his mind that the Wayne County Sheriff's Department needed a police-specific counseling program (Tr. 4/19/89, pp. 151, 158). Anthony Shannon, the director of training for the Wayne County Sheriff's Department, testified that the police-specific counseling program finally adopted by Sheriff Ficano in 1986 was actually needed by the Sheriff's Department back in the 1970's (Tr. 4/24/89, pp. 38-39).[11]

When Marc Davis was a deputy in the Department, no police-specific counseling was provided by the Department. At that time, the existing counseling program was a county-wide program which was not police-specific, was not indigenous to the Sheriff's Department, and was coordinated and staffed entirely by unpaid volun-

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11 The Wayne County Sheriff did not have a police-specific program until 1986 officially although there was an ad hoc program in place as of late 1985 (Tr. 4/19/89, p. 155). The Wayne County Sheriff finally got around to the implementation of the necessary counseling program well after the shootings in this case and only after other similar events within the department (shootings by officers involving family situations) (Tr. 5/3/89, p. 168). The union for the deputy sheriffs in fact took the initiative in getting the program implemented after an incident in March, 1985 (Tr. 5/3/89, pp. 17-18).

teers (Tr. 4/19/88, p. 149; Tr. 4/20/89, p. 66). The very existence of this program was unknown to the deputies it was supposed to assist. Numerous deputies testified that they were not aware of any employee assistance programs during this time (Tr. 4/25/89, pp. 49, 180; Tr. 5/2/89, pp. 50, 110-111; Tr. 5/4/89, pp. 70-71).

(c) The Lack Of Annual Performance Evaluations

The evidence at trial also revealed well-established standards for periodic performance evaluations of police officers. These came into being as a result of the riots and disturbances of the 1960's (Tr. 5/8/89, p. 126). The federal government became involved in massive studies of police operations in the United States and in 1973 issued the President's Commission on Standards of Justice in the United States (Tr. 5/8/89, p. 126). Plaintiff's police administration expert testified that the basis for these standards was prevention of liability for police departments (Tr. 5/8/89, p. 134).

The testimony at trial demonstrated that high ranking officials in the Sheriff's Department knew of these standards. Indeed, William Lucas worked on a manual of standards for law enforcement published in 1983; one of the standards set forth was for annual performance reviews (Tr. 4/20/89, p. 112). Sheriff Lucas was aware of the need for annual performance reviews for law enforcement officers prior to 1975 (Tr. 4/20/89, p. 113). Anthony Shannon, director of training for the Department, also knew of these standards (Tr. 4/24/89, p. 15). Shannon testified that he knew of the supervisors' unwillingness to confront the code of silence, and this was why a formal evaluation process was necessary (Tr. 4/24/89, p. 72).

Mr. Jurcisin agreed that law enforcement work is high-risk so that monitoring strictness and evaluation are *obviously needed* (Tr. 4/19/89, p. 164). He believed it was

the responsibility of management to maintain an oversight mechanism that allows the employer to determine whether its employees continue to be suitable for the job and the powers associated with it (Tr. 4/19/89, p. 164).

An evaluation program adopted by the Wayne County Sheriffs' Department in the mid 1970's was abandoned after a union grievance and arbitration which struck down the plan (Tr. 4/24/89, p. 21). Anthony Shannon testified that the real reason for the failure to establish an evaluation process was economics and, in Shannon's own words, "*indifference*" (Tr. 4/24/89, p. 73). Mr. Shannon testified, "the State did not require it, so why do we have to do it" (Tr. 4/24/89, p. 73).

Thus, the Wayne County Sheriff did not have annual performance reviews during 1975 to 1983 (Tr. 4/24/89, p. 61). Once a deputy completed the probationary period, the departmental attitude was "no news is good news" (Tr. 5/3/89, p. 16). This was the express testimony of Richard Novak who was with the Department for 37 years, and was Undersheriff, second in command, at the time of the shootings in this case (Tr. 5/3/89, pp. 4, 16). According to Plaintiff's expert, Mr. Novak's "no news is good news" attitude reflected the Department's attitude very closely (Tr. 5/9/89, pp. 89-90). That is, as long as the Department did not hear anything, no one looked for anything (Tr. 5/9/89, p. 90). The reality of this "do nothing" style of management contrasts sharply with Jurcisin's testimony that command officers must aggressively supervise and evaluate personnel, and "ferret out" problems in the force (Tr. 4/20/89, pp. 52, 72).

As a result of the Department's failure to implement the evaluation procedures which Dale Jurcisin recognized as "obviously needed" (Tr. 4/19/89, p. 164) but which were not implemented due to "economics . . . and indifference" (Tr. 4/24/89, p. 73), Marc Davis had not been evaluated since he completed his probationary period in 1975 (Tr. 5/9/89, p. 66). Not coincidentally,

Marc Davis had never been written up for any disciplinary purpose, despite the long history of misconduct detailed above (Tr. 4/24/89, p. 61).

(*d*) The Existence Of A "Code Of Silence" As A Pervasive Practice And Custom Within The Department

Faced with massive problems among armed deputies, the Department decided not to use psychiatric screening, police-specific counselling, or annual evaluations. The sole method of review in this "no news is good news" environment was *ad hoc* investigations and discipline. As discussed above, this practice was so indifferent that the activities of Marc Davis triggered no consideration at all. In large part, this occurred despite actual knowledge, by numerous Sheriff's Department officers, of Marc Davis's misconduct. A major reason for inaction was the Department's "code of silence", a widespread unwritten practice by which Department personnel refrained from reporting misconduct of their peers (Tr. 4/20/89, pp. 51, 166).

Supervisory officers were aware that the code of silence more than likely prevented reports on deputies for conduct unbecoming an officer (Tr. 4/25/89, p. 80). Events were glossed over (Tr. 4/26/89, p. 145). Gerald Hammermeister, a supervisor within the department for 13 years, expressly acknowledged the code of silence (Tr. 4/26/89, p. 144). Lawrence Walters, also a command officer, testified that if there were any incidents regarding deputies, on or off-duty, "it mostly stayed there" and command officers were aware of this (Tr. 4/25/89, p. 79). James Reed, a Sergeant in the department, testified that he had "probably partaken" in the code of silence (Tr. 4/27/89, pp. 40, 63).

Command officers actively furthered the "code of silence". Deputy William Wensko testified that many

times over the years command officers indicated they did not want to be bothered with reports of incidents relating to fellow deputies (Tr. 4/25/89, p. 71). The message conveyed was "we can't ever get to it, just forget it, let it go" (Tr. 4/25/89, p. 65). This administrative attitude discouraged the filing of formal complaints against officers (Tr. 4/25/89, p. 66).

The "code of silence" was perhaps even more compelling for the female officers, who had difficulties integrating into a previously all-male work force (Tr. 4/27/89, p. 68). Officer Teresa Vasquez testified that if she had filed a report against a male deputy she would not have been able to function effectively as an officer from that point on (Tr. 4/26/89, p. 94).

Shannon, the director of training, could recall no directives to command officers designed to break down the "code of silence" (Tr. 4/24/89, p. 76). Richard Stover, an administrative aid to the Sheriff in 1983, testified that he could recall no written directives from 1975 to 1983 regarding the problem of the "code of silence" (Tr. 4/24/89, p. 155).

Plaintiff's expert testified that a "code of silence" is a real problem within a police agency. When a code of silence exists, there is no documentation of events and no disciplinary process (Tr. 5/8/89, p. 162). Affirmative steps to break down the code of silence must be taken from the top down (Tr. 5/8/89, p. 163). Notwithstanding the recognition at trial that command officers must actively "ferret out" problems (Tr. 4/20/89, p. 72), the prevailing message from supervisors to deputies was that the supervisors did not have time to deal with problems relating to deputies (Tr. 4/25/89, pp. 65-66).

(5)

THE SHOOTING

Marc Davis's ultimate explosion occurred on September 18, 1983. His rampage left a young mother dead,

another permanently paralyzed,[12] and a young man wounded.

During the late evening hours of September 17, 1983, Marc Davis went to the Wilson home, where Diana was staying. Outside the house, Marc engaged Diana in a fight (Tr. 5/2/89, p. 84; Tr. 5/10/89 p. 9), brandishing his "on-duty" .357 Magnum (Tr. 5/4/89, p. 116; Tr. 5/8/89, pp. 41-42). Kimberly Wilson called the police.

At about 12:45 a.m., Garden City Officer Sanborn arrived, responding to the dispatch which indicated that a gun was involved (Tr. 4/19/89, pp. 11, 53; Tr. 5/2/89, pp. 85-87; Tr. 5/8/89, p. 44). Marc Davis admitted that he had a gun, but produced his Sheriff's Department identification (Tr. 4/19/89, pp. 14, 54-55). Officer Sanborn, who would otherwise have arrested Marc Davis for carrying a concealed weapon, was unable to do so because Marc's status with the Department authorized him to possess the gun (Tr. 4/19/89, pp. 14-15).

Shortly after Officer Sanborn left, the argument rekindled. Marc Davis then opened fire with life-shattering effect (Tr. 4/19/89, p. 50; Tr. 5/4/89, p. 116).

(6)

PROCEEDINGS IN THE TRIAL COURT

Trial began before Judge Jourdan and a jury on April 18, 1989. Much of the testimony is summarized above. Plaintiff's evidence also included additional expert testimony from Dr. Tanay, a psychiatric expert, and Mr. Postill, a police procedures expert.

Dr. Tanay reviewed the events in Marc Davis's background which indicated his unbalanced state. Pulling a

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12 As the issues presented do not involve the damage facet of the case, the catastrophic impact will not be discussed at length. Attached as Exhibit E, is the Statement of Facts from Plaintiffs' Brief as Cross-Appellant in the Court of Appeals, which details the damage testimony at trial.

gun on another officer reflects a loss of control (Tr. 5/1/89, p. 52). Striking a prisoner also indicates a loss of control (Tr. 5/1/89, p. 55). Drinking on the job is a plea for help, as is asking another officer to hit you; these are self-destructive signs (Tr. 5/1/89, pp. 58-59). Riding a motorcycle into a wall is inappropriate conduct (Tr. 5/1/89, p. 57). Marc's professed desire to fight in a war shows the boiling aggression and anger (Tr. 5/1/89, p. 59), while his crying on the job confirmed that he was stressed to the breaking point and a tragedy was in the making (Tr. 5/1/89, p. 57).

According to Dr. Tanay, Marc Davis was unfit to be on the force because he was so mentally distressed (Tr. 5/2/89, p. 15). Marc Davis's personality type was of someone who is explosively violent. He poses a danger to the community because he has a gun, and is not fit for that kind of a responsibility (Tr. 5/2/89, p. 28). Such a person will have a number of violent blowups throughout his lifetime. The consequence of each blowup depends on the instruments at hand at a particular time (Tr. 5/1/89, pp. 22-23). Police officers should be people who can handle provocative situations without exploding. Marc Davis was not a fit person to be a police officer (Tr. 5/1/89, p. 60). He was too sick and disturbed to be permitted to carry a gun (Tr. 5/1/89, p. 157).

The domestic violence and problems of Marc and Diana Davis were obvious to everybody who had some contact with them. It was common knowledge (Tr. 5/2/89, pp. 27, 32). Marc Davis's stress manifested itself by increasingly more uncontrollable violent outbursts (Tr. 5/1/89, p. 86).

Their situation required recognition that this is an explosive situation. These people should have been deprived of their weapons. It required really paying attention that they were breaking down (Tr. 5/2/89, p. 32). One way to prevent a homicide is to eliminate the tools; you remove the gun. Because a gun is not only pulled by the fingers, it also pulls the fingers (Tr.

5/1/89, p. 52). The prime consideration in this tragedy was the fact that there was a gun of necessity in the life of these individuals. It was a tragedy that Marc was not only permitted but **required** to carry a gun (Tr. 5/1/89, pp. 111-112).

Mr. Postill reviewed the numerous instances of conduct by Marc Davis which required disciplinary action, but were ignored by the Department. The gun shot in the locker room, the drawing of a gun on a fellow deputy, the arrogant, abusive, cocky behavior: this kind of conduct has to be documented so corrective discipline or other avenues can be used to correct the misbehavior (Tr. 5/8/89, p. 155). The jail complaint [Trial Exhibit 16; attached Exhibit C] describing demeaning and unprofessional conduct requires a manager to investigate it, whether it is a valid complaint or not. If you do not correct it, you are at fault as a manager (Tr. 5/8/89, p. 168).

The incident described by Deputy Clair Parnell in which Marc Davis threatened to "beat [Diana Davis's] ass" if she did not turn over her check to him, is something that a supervisor has to record in order to fold into the annual review process (Tr. 5/9/89, pp. 5-6).

The confrontation described by Deputy Bill Wensko regarding Marc Davis and the prisoner in the registry room is an example of a major discipline event. It is clearly inappropriate. Marc should have been sent home, and the matter written up, and forwarded to a supervisor. Deputy Marc Davis was out of control and action should have been taken (Tr. 5/9/89, p. 8).

Consuming alcohol on the job [as described by Larry Davis in his testimony] is inappropriate conduct. The officer should be relieved of duty until an investigation is completed (Tr. 5/8/89, p. 164). The prisoner assault described by Deputy Vasquez is another example of a serious offense where discipline was appropriate. There was a need to document this incident for investigation (Tr. 5/8/89, p. 9).

Diana Davis's report to Sgt. Jim Reed that Marc Davis was beating her cannot be kept on a friendship level. A supervisor cannot compartmentalize information he receives about deputies. Once he learns something, he knows it. A supervisor cannot restrict his action because he thinks he received information as a "friend" (Tr. 5/9/89, pp. 18-19).

When Diana Davis appeared on the job with bruises, this was noticed by the department which should have caused them to investigate (Tr. 5/9/89, pp. 100-101). Marc Davis had a long history of personal problems that affected his job. This was certainly true within one or two or more years of the day of this shooting (Tr. 5/9/89, p. 64).

Crying on the job is very significant. It shows the officer is not stable. You relieve the officer from duty or you take the gun and badge away (Tr. 5/8/89, pp. 163-164).

Any business that saw a 25% failure rate would say something is wrong. The Department is not supervising and directing properly if it has that kind of failure rate (Tr. 5/9/89, p. 13).

Defendants' experts disagreed. They opined that Mr. Davis's prior conduct provided no inkling that he was violent or imbalanced (Tr. 5/15/89, pp. 20-21, 45-48; Tr. 5/16/89, p. 53).

Eventually, the case was submitted to the jury on May 17, 1989. Judge Jourdan instructed the jury regarding liability (Tr. 5/17/89, pp. 121-122):

> "[P]laintiffs must show that the sheriff had a policy, practice or custom which caused the plaintiffs to be injured. You cannot find Sheriff Ficano liable merely because he happened to be the employer of Marc Davis. A policy, practice or custom may be found by you that would make Sheriff Ficano liable if you determine that Sheriff

Ficano had a wide spread pattern of management indifference. In order to find liability on the part of Sheriff Ficano you have to determine that this indifference amounted to deliberate indifference on the part of the sheriff. You may determine that there has been deliberate indifference by considering either a positive act of Sheriff Ficano or Sheriff's [sic] Ficano's failure to act."

"Deliberate indifference may be demonstrated where there has been a failure to act with regard to circumstances or in a area where the need to act may be characterized as being obvious. It is for you to decide whether the circumstances or the area of need can be said to be obvious, or deliberate indifference may be demonstrated where a [sic] action, be it a policy, practice or custom has occurred which is inadequate under the circumstances and its inadequacy may be characterized as being obvious. It is for you to decide whether the inadequacy of the policy, practice or custom may be characterized as being obvious. It makes no difference that Robert Ficano was the Wayne County Sheriff for only five and one half months when this incident took place, as the successor in that office the sheriff assumes legal liability for ongoing policies, practices or customs of the Wayne County Sheriff. It is of course, for you decide what those policies, practices or customs were."

The court also instructed the jury regarding causation (Tr. 5/17/89, p. 114):

"Now, let me give you some definitions. When I use the words 'proximate cause', I mean first that the conduct of Sheriff Ficano must have been a cause of plaintiff's injuries, and second,

> that plaintiff's injuries must have been a natural and probably [sic] result of that conduct."

Applying these instructions, the jury returned its verdict on May 18, 1989, a month after the trial began. Following reinstruction on the liability issues (Tr. 5/18/89, pp. 17-18), the jury returned a unanimous verdict for Plaintiffs (Tr. 5/18/89, pp. 19-20).

(7)

THE APPEAL

Defendant challenged the sufficiency of the evidence on appeal. The decision of the Court of Appeals (Hon. Martin Doctoroff, Hon. Michael J. Kelly, Hon. Roman Gribbs) reversed and directed judgment for Defendant, *Davis* v *Wayne County Sheriff*, 201 Mich App 572 (1993) (Exhibit A). The Court later denied Plaintiffs' timely Motion for Rehearing (Exhibit B).

Applying the ordinary standards for evaluating a directed verdict or judgment n.o.v. motion in the light most favorable to Plaintiffs (*Davis*, 201 Mich App at 579), the Court concluded that the past conduct of Marc Davis was largely unknown to those responsible for disciplining Davis and that, "there is nothing in the record to suggest that defendant dissuaded or furthered the failure of the deputies to report the activities" (201 Mich App at 583). The Court found no evidence that the Department "deliberately furthered the code of silence, or was consciously indifferent to its existence", and concluded there was therefore no actionable "policy" (201 Mich App at 584). The Court also held that the evidence was insufficient to show § 1983 causation (201 Mich App at 584). Finally, the Court concluded that the Sheriff's conduct could not be deemed "deliberate indifference".

Plaintiffs now seek leave to appeal.

Supreme Court, U.S.
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No. 94-1794

In The Supreme Court of the United States

October Term, 1994

DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased,

Petitioners,

v.

ROBERT FICANO, Sheriff of Wayne County, and THE COUNTY OF WAYNE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

AND APPENDIX

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHERE AN OFF-DUTY DEPUTY SHERIFF INJURES MEMBERS OF HIS FAMILY DURING A DOMESTIC DISPUTE, CAN HIS GOVERNMENTAL EMPLOYER BE HELD CONSTITUTIONALLY RESPONSIBLE FOR HIS PERSONALLY MOTIVATED CONDUCT UNDER 42 U.S.C. § 1983 WHERE PETITIONERS RELIED ON ALLEGATIONS OF "DELIBERATE INDIFFERENCE" TO SATISFY EACH OF THE ELEMENTS OF THE § 1983 CAUSE OF ACTION BUT WHERE

(1) THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT RESPONDENT HAD ACTUAL KNOWLEDGE OF THE ALLEGED VIOLENT PROPENSITIES OF THE DEPUTY AND PETITIONERS FAILED TO PRESENT EVIDENCE OF ANY INCIDENTS OF ASSAULTIVE CONDUCT BY OTHER DEPUTY SHERIFFS;

(2) PETITIONERS ERRED IN RELYING ON THE ALLEGED "DELIBERATE INDIFFERENCE" OF RESPONDENT TO SATISFY THE REQUISITE CAUSAL CONNECTION BETWEEN THE ALLEGED POLICY OR CUSTOM AND THE ALLEGED CONSTITUTIONAL VIOLATION; AND

(3) THE DEPUTY'S CONDUCT DID NOT CONSTITUTE "STATE ACTION" AND NO CONSTITUTIONAL DUTIES WERE OWED BY RESPONDENT TO PROTECT THE DEPUTY'S FAMILY FROM THE DOMESTIC VIOLENCE?

LIST OF PARTIES

Petitioners Diana Davis
and Tod A. Wilson are individuals.

Respondent Robert Ficano
is the duly elected Sheriff of Wayne County, Michigan.

The County of Wayne
is a political subdivision of the State of Michigan which was dismissed from this action by order dated December 17, 1986.

There is no parent or subsidiary company to be listed under Rule 29.1

TABLE OF CONTENTS

PAGE

Counter-Statement of Questions Presented i

List of Parties ii

Table of Authorities v

Opinion Below 1

Jurisdiction 1

Statute and Constitutional Provisions Involved 2

Counter-Statement of the Case 3

Reasons For Denying the Writ:

WHERE AN OFF-DUTY SHERIFF INJURES MEMBERS OF HIS FAMILY DURING A DOMESTIC DISPUTE, HIS GOVERNMENTAL EMPLOYER CANNOT BE HELD CONSTITUTIONALLY RESPONSIBLE FOR HIS PERSONALLY MOTIVATED CONDUCT UNDER 42 U.S.C. § 1983 WHERE PETITIONERS RELIED ON ALLEGATIONS OF "DELIBERATE INDIFFERENCE" TO SATISFY EACH OF THE ELEMENTS OF THE § 1983 CAUSE OF ACTION BUT WHERE (1) THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT RESPONDENT HAD ACTUAL KNOWLEDGE OF THE ALLEGED VIOLENT PROPENSITIES OF THE DEPUTY AND PETITIONERS FAILED TO PRESENT EVIDENCE OF ANY INCIDENTS OF ASSAULTIVE CONDUCT BY OTHER DEPUTY SHERIFFS; (2) PETITIONERS ERRED IN RELYING ON THE ALLEGED "DELIBERATE INDIFFERENCE" OF RESPONDENT TO SATISFY THE REQUISITE CAUSAL CONNECTION BETWEEN THE ALLEGED POLICY OR CUSTOM AND THE ALLEGED CONSTITUTIONAL VIOLATION; AND (3) THE DEPUTY'S CONDUCT DID NOT CONSTITUTE "STATE ACTION" AND NO CONSTITUTIONAL DUTIES WERE OWED BY RESPONDENT TO PROTECT THE DEPUTY'S FAMILY FROM THE DOMESTIC VIOLENCE. 12

A. The United States Supreme Court Has Already Distinguished "Subjective" Deliberate Indiffer-

PAGE

ence From "Objective" Deliberate Indifference And, Contrary To Petitioners' Assertions, The Michigan Court Of Appeals Applied The Proper Standard To The Record Of This Case And Concluded That Where The Evidence Was Insufficient To Establish That Respondent Had Actual Knowledge Of The Alleged Violent Propensities Of Marc Davis, And Where Petitioners Failed To Present Evidence Of A Pattern Of Similar Constitutional Violations, The Evidence Was Insufficient To Support A Finding Of Objective Deliberate Indifference. 15

B. Petitioners' Proofs Failed To Demonstrate The Requisite Causal Link Between An Alleged Policy Or Custom Created As A Result Of Deliberate Indifference To Constitutional Rights And The Alleged Constitutional Deprivation In This Case; Proof Of "Deliberate Indifference," Standing Alone, Cannot Suffice. 20

C. Respondent's Alleged Failure To Protect Petitioners From Marc Davis While He Was Acting Solely In His Individual Capacity, And Was Not Acting Under Color Of State Law, Did Not Constitute A Violation Of Any Duty Imposed By The Federal Constitution; No Constitutional Rights Were Implicated And There Could Be No Liability Under 42 U.S.C. § 1983. 22

Conclusion 28

APPENDIX:

Concise Statement of Material Facts and Proceedings, excerpted from Defendant-Appellee's Answer to Delayed Application for Leave to Appeal (filed with Michigan Supreme Court 5/7/94) A-1

PAGE

TABLE OF AUTHORITIES

Cases:

Baker v. *McCollan*, 443 U.S. 137; 99 S. Ct. 2689; 61 L. Ed. 2d 433 (1979) 22

Brandon v. *Holt*, 469 U.S. 464; 105 S. Ct. 873; 83 L. Ed. 2d 878 (1985) 15

City of Canton v. *Harris*, 489 U.S. 378; 109 S. Ct. 1197; 103 L. Ed. 2d 412 (1989) 4, 12, 16, 19, 20, 24, 28

City of Los Angeles v. *Heller*, 475 U.S. 796; 106 S. Ct. 1571; 89L. Ed. 2d 806 (1986) 25

Collins v. *City of Harker Heights*, ___ U.S. ___; 112 S. Ct. 1061; 117 L. Ed. 2d 261 (1992) 13, 24

DeShaney v. *Winnebago County Department of Social Services*, 489 U.S. 189; 109 S. Ct. 998; 103 L. Ed. 2d 249 (1989) 25, 26, 27

Farmer v. *Brennan*, ___ U.S. ___; 114 S. Ct. 1970; 128 L. Ed. 2d 811 (1994) 16

Garrett v. *Gilless*, 1995 W.L. 16810 (6th Cir. (Tenn.) ... 17

Gavin v. *McGinnis*, 866 F. Supp. 1107 (N.D. Ill. 1994) .. 17

Manarite v. *City of Springfield*, 957 F.2d 953 (1st Cir. 1992) *cert denied*, 113 S. Ct. 113 (1992) 17

Molton v. *City of Cleveland*, 839 F.2d 240 (6th Cir. 1988), *cert denied*, 489 U.S. 1068 (1989) 17

Monell v. *New York Department of Social Services*, 436 U.S. 658; 98 S. Ct. 2018; 56 L. Ed. 2d 611 (1978) .. 27

Oklahoma City v. *Tuttle*, 471 U.S. 808; 105 S. Ct. 2427; 85 L. Ed. 2d 791 (1985) 20, 21

York v. *Detroit (After Remand)*, 438 Mich. 744; 475 N.W. 2d 346 (1991) 13

PAGE

Other Authorities:

28 U.S.C. § 1257(a) ..... *passim*

42 U.S.C. § 1983 ..... *passim*

Rule 14.1(g) 3, 4, 5

Rule 14.1(h) 4

Rule 15.1 4

United States Constitution, Amendment XIV 2

No. 94-1794

In The

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DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased,

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Michigan Court of Appeals is reported at 201 Mich. App. 572; 507 N.W.2d 751 (1993). Petitioners' Delayed Application for Leave to Appeal was denied by the Michigan Supreme Court at 447 Mich. 959 (1995), reconsideration denied.

JURISDICTION

The opinion of the Michigan Court of Appeals was entered on September 20, 1993. Petitioners filed a Delayed Application for Leave to Appeal to the Michigan Supreme Court and Respondent thereafter filed a timely Cross-Application for Leave to Appeal. These applications were denied by the Michigan Supreme Court on November 16, 1994. Petitioners thereafter filed a timely Motion for Reconsideration of the order denying

delayed leave to appeal, which motion was denied on January 31, 1995. Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). However, this Court does not have jurisdiction to review the issues sought to be presented by petitioners because they were not properly and timely raised below.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation and application of 42 U.S.C. § 1983:

United States Code, Title 42:

> **§ 1983. Civil action for deprivation of rights.**
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

To the extent that petitioners have relied on any specific constitutional provision in support of their case, it appears they have relied generally and variously on the Fourteenth Amendment to the United States Constitution:

United States Constitution, Amendment XIV:

> **§ 1. Citizenship rights not to be abridged by states.**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Contrary to petitioners' inclusion of the Fourth Amendment to the United States Constitution in their Petition pending before this Court, petitioners have never seriously relied on the Fourth Amendment in support of their assertion of § 1983 liability against respondent, they did not submit this case to the jury based on a Fourth Amendment theory, and they have never before articulated an alleged deprivation of rights protected by this Amendment.[1]

COUNTER-STATEMENT OF THE CASE

The principal issues presented to the Michigan Court of Appeals in this matter concerned the scope of the federal civil rights act, 42 U.S.C. § 1983, questioning whether that statute was broad enough to support a verdict holding that the Wayne County Sheriff was constitutionally responsible for the off-duty actions of one of his deputy sheriffs where those actions were taken against members of the deputy's family during a domestic dispute.

Rule 14.1(g) of the Rules of the Supreme Court of the United States requires that a Petition for a Writ of Certiorari contain a "*concise* statement of the case con-

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[1] **Notwithstanding the plethora of briefing which occurred in the Michigan appellate courts, perhaps the only reference made by petitioners to the Fourth Amendment is contained in their Motion for Reconsideration filed with the Michigan Supreme Court after that Court had denied the delayed application for leave to appeal.**

taining the facts material to the consideration of the questions presented." (Emphasis in original) Rule 14.1(h) requires that the statement of the case set forth the facts necessary to demonstrate that the federal questions raised in the petition were "timely and properly raised" in the state appellate courts. As discussed below, petitioners have not complied with either the spirit of Rule 14.1(g), or the letter of Rule 14.1(h).

Moreover, Rule 15.1 admonishes the respondent to "address any misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." It is difficult, if not impossible, to fully comply with this requirement because petitioners have consistently overstated the facts and miscited the law in an attempt to make it appear as if the legal theories espoused in the pending petition were both factually supported at trial, as well as legally sustainable as viable § 1983 theories. However, as discussed herein, these theories were neither factually supported nor legally recognized. Nor, for that matter, were the questions presented in this petition "timely and properly raised" below so as to preserve them for review on a writ of certiorari.[2]

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[2] Petitioners now contend that the Michigan Court of Appeals erroneously applied a subjective test to the "deliberate indifference" inquiry, rather than the objective test enunciated by this Court in *City of Canton* v. *Harris*, 489 U.S. 378; 109 S. Ct. 1197; 103 L. Ed. 2d 412 (1989), suggesting that the confusion evidenced by this alleged misapplication of *Canton* v. *Harris* justifies the granting of their Petition. This contention was not set forth by petitioners in either their Motion for Rehearing filed with the Michigan Court of Appeals, or in their delayed Application for Leave to Appeal filed with the Michigan Supreme Court. Rather, this argument first appeared in the Motion for Reconsideration filed with the Michigan Supreme Court following its denial of leave to appeal.

The second question presented by petitioners for review relates to the issue of causation, with petitioners contending that proof of deliberate indifference should also suffice to satisfy the independent

(*concluded on page 5*)

With respect to the requirement of Rule 14.1(g) for a concise statement of the case, the unanimous opinion of the Michigan Court of Appeals, reported at 201 Mich. App. 572; 507 N.W.2d 751 (1993), concisely sets forth the material facts of this case. However, petitioners have neither relied on the facts as set forth in that opinion, nor set forth their own concise and objective presentation of the material facts. Rather, petitioners have included a Statement of the Case which is argumentative, while appending the "Concise Statement of Material Facts and Proceedings" which was originally attached to their delayed Application for Leave to Appeal to the Michigan Supreme Court. Neither of these expositions fairly and objectively present this matter to this Court.[3]

The petitioners were injured on September 18, 1983, when they were shot by their husband/brother-in-law, Marc Davis, during the heat of a domestic dispute. They attempted to impose 42 U.S.C. § 1983 liability for their

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(*continued from page 4*)

element of causation. Since petitioners have consistently depended on "deliberate indifference" to satisfy *each* of the elements of a cause of action under 42 U.S.C. § 1983, including the existence of a policy or custom, causation, and the existence of a constitutional right, they have arguably preserved this issue. However, their position on causation has never been either clear or consistent. In their Motion for Rehearing before the Michigan Court of Appeals, for example, they took the position that all that was required to satisfy the causation element of this case was a "plausible nexus." (Motion for Rehearing, ¶10, p. 5) In their delayed Application for Leave to Appeal to the Michigan Supreme Court, petitioners contended that the element of causation was satisfied whenever the tortfeasor's conduct was "consistent" with the alleged policy or custom. (Brief in Support of Application for Leave to Appeal, p. 6)

3 Although respondent would otherwise have been content to rely on the facts set forth in the opinion of the Court of Appeals, and because it is virtually impossible to correct all of the misconceptions which may have been created by petitioners' Concise Statement of Material Facts and Proceedings, respondent has also appended the Concise Statement which was included in his Answer to the petitioners' Delayed Application for Leave to Appeal.

injuries on the Wayne County Sheriff because, although Marc Davis was admittedly off-duty at the time of the incident and was not acting in his capacity as a Wayne County Deputy Sheriff, Davis was an employee of respondent and the weapon he used to assault his family happened to be his service revolver.

Since the only connection that the respondent had to the shootings in this case was the fact that Marc Davis shot his family members with his service revolver, petitioners attempted to establish the requisite causal relationship in their appellate pleadings by claiming that when Officer Sanborn of the Garden City Police Department was first called to the scene of the domestic dispute, he would have arrested Marc Davis but that he could not do so because of the fact that Davis was a Wayne County deputy who was authorized to carry a gun. Thus, in their Concise Statement to the Michigan Supreme Court, petitioners stated that "[w]hen the Garden City police officer arrived, he was unable to confiscate Marc's weapon or arrest him for carrying it because of his status as a deputy sheriff" (Petition, A-29), and again, "Officer Sanborn, who would otherwise have arrested Marc Davis for carrying a concealed weapon, was unable to do so because Marc's status with the Department authorized him to possess the gun." (Petition, A-48)[4] Officer Sanborn's testimony, however, was to the contrary. He specifically testified that, regardless of Marc Davis' status as a deputy sheriff, he would have taken action against him if he had thought that Diana Davis was in any danger. (Tr. 4/19/89, 55-61)

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4 This contention was also continued in the body of the delayed Application for Leave to Appeal filed with the Michigan Supreme Court where, at page 56, the petitioners claimed that if Marc Davis had been any other person, he would have been arrested for possession of the gun and that it was "only because of the immunity from the concealed weapon criminal statute afforded by his continued employment by the Department as an armed deputy that Marc Davis was insulated from arrest." These factually and legally inaccurate assertions continue in the pending Petition.

She, however, assured him that there was no danger. (Tr. 4/19/89, 13, 15, 44, 59, 61) According to Officer Sanborn, he left because of the assurances of Diana Davis, and not because Marc Davis was a Wayne County Deputy Sheriff.[5]

Although more subtly, in their Petition to this Court petitioners have continued the improper innuendo concerning the import to Officer Sanborn of Davis' position as a deputy sheriff. At page 3 of the Petition, petitioners state that "[t]he potential for harm if unfit officers possess deadly force is well-known, since every officer is required to possess his/her gun 24 hours a day, *and state law immunizes off-duty officers from arrest for gun possession.*" (Emphasis added) Petitioners have not cited legal authority for this proposition, because there is none.

Likewise, at page 6, petitioners state that "Officer Sanborn left the home after determining that Marc Davis had authority to have a weapon because he was a deputy sheriff." While it is true that Officer Sanborn did learn that Marc Davis was a deputy sheriff before he left the home, the inference that this is why he left the home, or that he otherwise would not have left the home, is untrue, as discussed above.

In support of the theories presented at trial, petitioners relied almost exclusively on a number of incidents involving Marc Davis which petitioners argued evidenced that he was unfit to carry a weapon. In both the pending Petition, as well as in their Concise Statement of Material Facts appended to that Petition, peti-

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5 It may also be noted that Officer Sanborn did not testify that he would have arrested Marc Davis for carrying a concealed weapon if he had not been a deputy sheriff, as contended by petitioners. Rather, Officer Sanborn testified that had Davis not identified himself as a deputy sheriff, he would have asked to see his permit for carrying a concealed weapon and, if he had none, Davis might then have been arrested because of his illegal possession of a gun. (Tr 4/19/89, 14-15)

tioners repeatedly refer to the knowledge the respondent Sheriff allegedly possessed concerning this aberrant behavior, as if respondent had actual knowledge of these instances and therefore should have known (had constructive knowledge) that Marc Davis was a violent and unstable person who was likely to shoot members of his family during a domestic dispute.[6] In fact, however, while the behavior referred to by petitioners was, in some instances, known by some employees of the Sheriff's Department, most of the examples relied upon by petitioners were either known by no one in the Department at all, or known only by persons in non-supervisory positions who cannot be said to establish policy for the Department. (See discussion in Respondent's Appendix at A-7–A-10, A-13–A-17) As the Court of Appeals stated in its opinion, "Significantly, the inci-

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6 For example, petitioners' Concise Statement submitted to the Michigan Supreme Court, and appended to their Petition to this Court, contains the following statements: "Marc was a Wayne County Deputy Sheriff whose 8-year career was marked by numerous acts of bizarre conduct and violence *which were known to the Wayne County Sheriff's Department.*" (Petition, A29) (Emphasis added) "Marc Davis' physical abuse of Diana Davis *was known to the department* but never triggered any departmental response." (Petition, A37) (Emphasis added) Similarly, petitioners remarked that the activities of Marc Davis triggered no consideration by respondent, "*despite actual knowledge*, by numerous Sheriff's Department officers, of Marc Davis' misconduct." (Petition, A46) (Emphasis added)

Further, the pending Petition contains such statements as: "Despite the history of violence, Marc Davis received no counselling and no discipline, and remained armed." (Petition, p. 5) The implication of this statement is that the respondent was aware of the "history of violence." At p. 6, petitioners state that respondent "elected to conduct no investigation or discipline of Marc Davis despite his misconduct," as if this had been a conscious "election" of alternatives based on actual knowledge of the need for investigation or discipline. See also page 21 of the Petition where various incidents of misconduct were alleged to be "obvious," as if they had been actually known. Petitioners also claim, on page 21 of the Petition, that the past incidents of private violence against Diana Davis were actually known to respondent, although the facts do not support this assertion.

dents mentioned above were, for the most part, admittedly never reported up the chain of command and each person responsible for disciplining Davis testified that they had no knowledge of the alleged misconduct." (201 Mich. App. 572, 583) Although petitioners would like to present this case as one in which a history of misconduct was indisputably known by respondent, this is not such a case.

At pages 5 and 6 of the Petition, petitioners claim that respondent conducted no psychiatric counseling of deputies, further claiming that respondent conceded that this was a policy attributable to him. This is not true. While petitioners complained about the *type* of counseling which was available to deputies, they did not contend at trial that *no* counseling was afforded to deputies, and respondent never conceded that no counseling was provided because this was not true. Indeed, the evidence presented at trial clearly discloses the existence of counseling programs.

Furthermore, petitioners claim that the counseling program which was in effect "was so woefully inadequate that it had no paid professional staff at all." (Petition, p. 22, n.11) The insinuation is that the counseling was not being provided by professionals. This is not true. The same police-specific psychological treatment was available by trained professionals under both the program offered by respondent during the relevant time period, and the program which petitioners claim should have been offered. The only significant difference between the programs was that under the one advocated by petitioners, deputies were *always* referred to psychologists who were familiar with police officers' stress-related problems. (Tr. 4/19/89, 99-100; Tr. 4/20/89, 7-8, 11, 15-16, 62-67, 77-80, 97-99; Tr. 4/25/89, 123; Tr. 5/10/89, 73)

As set forth in the pending petition, the jury was instructed concerning the elements of § 1983 liability. It should be noted, however, that respondent objected to

the circuit court's instruction concerning deliberate indifference (Tr. 5/17/89, p. 128, *et. seq.*) because it allowed the jury to find deliberate indifference to a pattern of constitutional violations based on a single instance of assaultive behavior. This was one of the issues raised by respondent in its successful appeal to the Michigan Court of Appeals.[7]

The jury returned a verdict imposing § 1983 liability on respondent. Following the denial of his motion for judgment notwithstanding the verdict or new trial, respondent appealed to the Michigan Court of Appeals, contending, *inter alia*, that he was entitled to judgment in his favor because the plaintiffs' proofs were insufficient to establish *any* of the requisite elements of a 42 U.S.C. § 1983 cause of action (including the absence of a *constitutional* deprivation) and that the trial court had erred in its instructions to the jury regarding these elements. After extensive briefing and oral argument, the Michigan Court of Appeals released its opinion, reversing the judgment which had been entered against respondent, and remanding the case for entry of judgment in his favor. Although the Court of Appeals found that any constitutional deprivation was committed "under color of state law," it did not specifically address respondent's argument that there had been no *constitutional* violation. However, noting that "liability for an officer's off-duty conduct that results in death or bodily injury to citizenry may only be imposed where that officer's conduct is directly related to a policy, or lack of a policy, adopted with deliberate indifference to the

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7 The circuit court had refused respondent's request to include the following instruction to the jury regarding the showing necessary to warrant a finding that he had a custom or policy of acquiescing in unconstitutional conduct: "Isolated events will not establish a pattern of abusive behavior. Neither will mere recitation suffice to prove a policy or custom. Plaintiff must show why those prior incidents deserve discipline and how the misconduct was similar to that involved in the present case." (See Defendant-Appellant's Brief on Appeal, p. 39)

rights of citizens," (201 Mich. App., 581), the Court of Appeals reversed the judgment entered against respondent, specifically finding that (a) petitioners had failed to produce sufficient evidence of a relevant policy or custom; (b) petitioners had failed to produce sufficient evidence of deliberate indifference and had, at most, produced evidence of negligence; and (c) petitioners had failed to produce sufficient evidence of a causal link between the harm suffered by the petitioners and any alleged policy.[8]

Petitioners filed a delayed application for leave to appeal to the Michigan Supreme Court, contending that the Michigan Court of Appeals had erred when it found the evidence insufficient to support a finding of a policy or custom, created with deliberate indifference, which caused a constitutional deprivation. Respondent filed a cross-application for leave to appeal, asking that, if review were granted, the Court also review the elements of "color of state law" and "constitutional" deprivation. Leave to appeal was denied.

Petitioners now seek further review from this Court, contending that this case merits consideration concerning application of the § 1983 elements of deliberate indifference and causation. Also implicit in these issues is the threshold question of the existence of a constitutional deprivation, as recognized by the petitioners' formulation of their issues, as well as their (belated) attempt to identify a constitutional right implicated by their allegations.

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8 **Having so concluded, the Michigan Court of Appeals did not consider respondent's other, independent, allegations of error, which also supported a reversal of the judgment entered against it.**

REASONS FOR DENYING THE WRIT

WHERE AN OFF-DUTY SHERIFF INJURES MEMBERS OF HIS FAMILY DURING A DOMESTIC DISPUTE, HIS GOVERNMENTAL EMPLOYER CANNOT BE HELD CONSTITUTIONALLY RESPONSIBLE FOR HIS PERSONALLY MOTIVATED CONDUCT UNDER 42 U.S.C. § 1983 WHERE PETITIONERS RELIED ON ALLEGATIONS OF "DELIBERATE INDIFFERENCE" TO SATISFY EACH OF THE ELEMENTS OF THE § 1983 CAUSE OF ACTION BUT WHERE (1) THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT RESPONDENT HAD ACTUAL KNOWLEDGE OF THE ALLEGED VIOLENT PROPENSITIES OF THE DEPUTY AND PETITIONERS FAILED TO PRESENT EVIDENCE OF ANY INCIDENTS OF ASSAULTIVE CONDUCT BY OTHER DEPUTY SHERIFFS; (2) PETITIONERS ERRED IN RELYING ON THE ALLEGED "DELIBERATE INDIFFERENCE" OF RESPONDENT TO SATISFY THE REQUISITE CAUSAL CONNECTION BETWEEN THE ALLEGED POLICY OR CUSTOM AND THE ALLEGED CONSTITUTIONAL VIOLATION; AND (3) THE DEPUTY'S CONDUCT DID NOT CONSTITUTE "STATE ACTION" AND NO CONSTITUTIONAL DUTIES WERE OWED BY RESPONDENT TO PROTECT THE DEPUTY'S FAMILY FROM THE DOMESTIC VIOLENCE.

In this case the petitioners alleged that the conduct of the respondent Wayne County Sheriff caused them to suffer a wrong of constitutional magnitude. Since their case was brought pursuant to 42 U.S.C. § 1983, the liability of the Sheriff could not be premised solely on the fact that an injury was inflicted by one of his employees, or as a result of his negligence. As properly stated by the Michigan Court of Appeals, "[i]n order to establish such a claim against a municipality or an agency thereof, the plaintiff must show that a policy or custom tantamount to deliberate indifference for the constitutional rights of others actually caused the violation,"[9] citing *Canton* v. *Harris*, 489 U.S. 378, 381, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989), *Monell* v. *New York Department of Social Services*, 436 U.S. 658, 691, 98 S. Ct. 2018,

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9 201 Mich. App., 577.

56 L. Ed. 2d 611 (1978) and *York* v. *Detroit (After Remand)*, 438 Mich. 744, 758; 475 N.W. 2d 346 (1991).

Applying these proper standards, the Michigan Court of Appeals concluded that petitioners had failed to provide sufficient evidence to support a § 1983 cause of action. To have imposed liability on the Sheriff based on the record of this case would have made every governmental employer responsible for the off-duty, personally motivated, assaultive conduct of its employees who are either provided with weapons or trained in the use of force. The concluding remark of the Michigan Court of Appeals that "we are not ready to extend monetary liability to municipalities or other governmental agencies for employee conduct that occurs outside the scope of employment unless that conduct is very clearly motivated by official policies or customs to which the employee is expected to adhere"[10] is fully consistent with public policy and supported by United States Supreme Court precedent.[11] The appellate opinion implicates no questions requiring review and analysis by this Court.

In their Petition for a Writ of Certiorari, petitioners dispute the lower court's analysis of the evidentiary record. However, they can hardly dispute that, even assuming that a constitutional deprivation occurred in this case, they could only prevail on their § 1983 claim if they proved the existence of a policy or custom which both evidenced the Sheriff's deliberate indiffer-

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10 201 Mich. App., 589.

11 See, e.g., *Collins* v. *City of Harker Heights*, ___ U.S. ___; 112 S. Ct. 1061, 1067, 1070; 117 L. Ed. 2d 261 (1992) ["We did not suggest that all harm-causing municipal policies are actionable under § 1983 or that all such policies are unconstitutional. . . . Instead we concluded that if a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation. . . . The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions."]

ence to the rights of others and actually caused the constitutional deprivation at issue. The fatal flaw in petitioners' proofs lay in the fact that they attempted to satisfy these rigorous requirements by focusing almost exclusively on the question of deliberate indifference, variously arguing that proof of deliberate indifference may suffice to establish the relevant policy or custom, the constitutional right, as well as the causal link.[12] By erroneously focusing exclusively on deliberate indifference, petitioners ignored the other requisite elements of § 1983 liability. Moreover, and as found by the Court of Appeals, petitioners failed in their efforts to prove deliberate indifference, proving, at most, negligence.[13]

The arguments contained in the pending petition seem to suggest that proof of negligence should suffice, and that § 1983 liability may be imposed on respondent, even in the absence of any evidence that he either knew or should have know of widespread and flagrant constitutional violations resulting from specified policies or customs, or that he knew or had reason to know of a particular history of violent conduct associated with

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12 See, e.g., petitioners' Application for Leave to Appeal to the Michigan Supreme Court where, at pages 4- 5, they assert that proof of deliberate indifference itself establishes a constitutional deprivation ["Under the circumstances, injury which results from 'deliberate indifference' is a constitutional deprivation. . . . [T]he 'constitutional deprivation' element rises or falls with 'deliberate indifference' . . . and need not be addressed separately."] and page 10 where they equate deliberate indifference with proof of the policy or custom ["The Supreme Court recognized that inaction constituting 'deliberate indifference' qualifies as a 'custom' or 'policy' for § 1983 purposes."]

13 As more fully discussed, *infra*, the Michigan Court of Appeals also correctly concluded that petitioners had failed to prove the requisite causal link between any policy or custom evidencing deliberate indifference to constitutional rights and the alleged constitutional harm. Further, it properly rejected petitioners' assertion that the "code of silence" could constitute the relevant governmental policy: "Absent some evidence that the department deliberately furthered the code of silence, or was consciously indifferent to its existence, it cannot be said to be a departmental policy. On this record, there is no such evidence." (201 Mich. App., 584)

Marc Davis. Petitioners presented no such evidence and thus, were unable to prove their § 1983 claim on any of the permissible bases.[14]

A. The United States Supreme Court Has Already Distinguished "Subjective" Deliberate Indifference From "Objective" Deliberate Indifference And, Contrary To Petitioners' Assertions, The Michigan Court Of Appeals Applied The Proper Standard To The Record Of This Case And Concluded That Where The Evidence Was Insufficient To Establish That Respondent Had Actual Knowledge Of The Alleged Violent Propensities Of Marc Davis, And Where Petitioners Failed To Present Evidence Of A Pattern Of Similar Constitutional Violations, The Evidence Was Insufficient To Support A Finding Of Objective Deliberate Indifference.

Attempting to avoid the evidentiary deficiencies of their case, petitioners cite this Court's opinion in

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14 Petitioners now place primary emphasis on the alleged existence of a "custom." However, it was not until their "Supplemental Reply Brief," the third brief filed by petitioners with the Michigan Court of Appeals, that their focus shifted from proof of a policy to proof of a custom. Furthermore, the focus in the petition is on an asserted custom of a code of silence. Contrary to the representations contained throughout the Petition, a "code of silence" has not been recognized as a viable policy or custom for purposes of imposing liability under 42 U.S.C. § 1983. For example, petitioners cite this Court's opinion in *Brandon* v. *Holt*, 469 U.S. 464; 105 S. Ct. 873; 83 L. Ed. 2d 878 (1985) as a case in which liability was imposed upon a municipality for policies including "the inherently deficient nature of police administrative procedures involving the discovery of official misconduct." (Petition, p. 19) However, this was the opinion of the district court, not of the United States Supreme Court. The only issue presented to the Supreme Court in *Brandon* concerned the question of qualified immunity for officials sued in their official capacity. The Court specifically noted that it was not discussing the underlying merits of the claim or the validity of the plaintiff's legal theories: "As an alternative ground for affirming the judgment of the Court of Appeals, respondents argue that the record does not establish that petitioners' injury was caused by the kind of 'policy or custom' that 'may fairly be said to represent official policy' of the city of Memphis. . . . Because the Court of Appeals did not address this argument, we do not consider it. . . ." (469 U.S., 473, n. 25)

Farmer v. *Brennan*, ___ U.S. ___; 114 S. Ct. 1970; 128 L. Ed. 2d 811 (1994), as if it evidenced either error committed by the Michigan Court of Appeals or the need for additional clarification of § 1983 standards by this Court. In *Farmer*, *supra*, this Court discussed the standards for imposing liability for violations of the 8th Amendment, enunciated the test of deliberate indifference to be utilized in cases arising under the 8th Amendment, and differentiated that (subjective) test of deliberate indifference from the (objective) test for deliberate indifference set forth in *Canton* v. *Harris*, *supra*. The clarification of 8th Amendment law set forth in *Farmer*, *supra*, established a subjective standard of deliberate indifference to be used in cases arising under the 8th Amendment, while leaving intact the objective standard of deliberate indifference pursuant to which this case was reviewed by the Michigan Court of Appeals. In other words, *Farmer* did not alter the proof which was required by petitioners in this case; nor did it create a new standard by which the sufficiency of that proof was to be judged.

Petitioners assert, however, that the Michigan Court of Appeals did not apply the *Canton* v. *Harris* standard for deliberate indifference *which it cited*, but, rather, applied the yet to be enunciated test of deliberate indifference which, in *Farmer*, would be held applicable only to 8th Amendment litigation.[15] It is purportedly because of the alleged erroneous application of a subjective standard of deliberate indifference that petitioners seek review from this Court, suggesting that it evidences the need for clarification concerning the standard applic-

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15 The first time this asserted error was raised was in petitioners' Motion for Reconsideration following the Michigan Supreme Court's denial of their delayed application for leave to appeal. In neither their Motion for Rehearing before the Michigan Court of Appeals, nor in their delayed application for leave to appeal to the Michigan Supreme Court, did they complain about the alleged erroneous utilization of a subjective test of deliberate indifference. This question has not been preserved.

able to claims of municipal liability. In fact, however, the *Farmer* case has already provided the clarification needed in that area of law (8th Amendment claims) in which clarification was needed.[16]

Furthermore, contrary to petitioners' suggestion, the Michigan Court of Appeals did not require that petitioners' proofs demonstrate subjective deliberate indifference, but required nothing more than that required by *Canton* v. *Harris*: "The [*Canton*] Court further stated that the plaintiff must demonstrate that the need for training is so obvious, and the inadequacy so likely to

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16 In their Petition, petitioners attempt to make the case that additional clarification of the differences discussed in *Farmer* is needed by citing *Manarite* v. *City of Springfield*, 957 F.2d 953 (1st Cir. 1992) *cert denied*, 113 S. Ct. 113 (1992), and *Molton* v. *City of Cleveland*, 839 F.2d 240 (6th Cir. 1988), *cert denied*, 489 U.S. 1068 (1989), as cases which cite both 8th Amendment and 14th Amendment municipal liability cases with regard to the standard of deliberate indifference applicable to those cases. However, there is no argument that an improper standard was actually applied in either of these cases. Moreover, both cases were decided before *Farmer*, in which it was the *8th* Amendment litigants who were warned off the objective standard applicable to municipal liability. There is no indication that an impermissible subjective test is being utilized in 14th Amendment municipal liability cases and, to the extent that such cases exist, *Farmer* provides the needed clarification.

Gavin v. *McGinnis*, 866 F. Supp. 1107 (N.D. Ill. 1994), also cited by petitioners, was released only a few weeks after *Farmer*, with no reference to Farmer, and with no attempt to apply *Farmer*. It did not, in any event, apply an improper standard to supervisory liability.

Petitioners' citation to the unpublished opinion of the 6th Circuit Court of Appeals in *Garrett* v. *Gilless*, 1995 W.L. 16810 (6th Cir. (Tenn.)) is curious. Certainly that court was correct when, in the portion of the decision quoted by petitioners, it stated that liability cannot be predicated on mere negligence. Moreover, *Garrett* provides cogent support for respondent's position, discussed *infra*, that no constitutional duties were implicated in this case. Finally, the case at bar is even weaker than *Garrett* since, in *Garrett*, the defendant had knowledge of the ongoing domestic violence and no such knowledge was possessed by Respondent in the case at bar.

cause a violation, that an inference of deliberate indifference may be made." (201 Mich. App., 580)[17] However, petitioners presented absolutely no proofs with regard to any assaultive conduct by any deputy other than Marc Davis and, thus, there was no evidence to support a finding of objective deliberate indifference. If the Michigan Court of Appeals failed to refer to evidence supporting objective deliberate indifference, it was because no such evidence was offered at trial. Indeed, this case was tried by petitioners almost exclusively on the basis of various incidents involving Marc Davis; petitioners did not even attempt to demonstrate either widespread misconduct by other deputies or the Sheriff's resulting actual or constructive knowledge of the need for remedial action to avoid constitutional deprivations.

With respect to the proofs required for demonstrating a "city policy" of inadequate training, the *Canton* Court offered the following guidance:

> . . . It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the

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17 **The quotation included at page 15 of the pending Petition does not support petitioners' assertion that the Michigan Court of Appeals required actual knowledge. Moreover, it is incomplete, omitting the sentences immediately following the quoted portion, evidencing that either actual or constructive knowledge would suffice.**

need.[10] In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. [Footnote omitted]

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[10] For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, . . . can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

(489 U.S., 390)

In this case, however, petitioners never articulated a policy which was the equivalent of a failure to train police officers in the permissible use of deadly force. Thus, in order to prevail, it was necessary for them to present proofs that constitutional violations had so often happened in the past as a result of a particular policy of inaction that the city policymakers were deliberately indifferent when they failed to take necessary action to cure the situation. However, *no* proofs of prior violations were presented by petitioners. The focus of their proofs was exclusively on Marc Davis.

With regard to understanding the insufficiencies of the evidence in this case, and the fallacy of the petitioners' arguments with regard to that evidence, it should be noted that the only evidence of deputy misconduct presented by petitioners at trial related to Davis himself. There was no attempt to show widespread problems with the use of service revolvers by off-duty officers; there was no attempt to show wide-

spread problems with the use of service revolvers by off-duty officers; there was no attempt to show widespread problems regarding domestic difficulties with the deputies; there was no attempt to show widespread problems with the fitness of deputies to perform their duties. Without such evidence, and without evidence that respondent either knew or should have known of significant problems with Marc Davis himself, it was impossible for petitioners to demonstrate the disregard of an obvious danger. It is this lack of evidence which serves to distinguish this case from virtually every case on which petitioners seek to rely.

B. Petitioners' Proofs Failed To Demonstrate The Requisite Causal Link Between An Alleged Policy Or Custom Created As A Result Of Deliberate Indifference To Constitutional Rights And The Alleged Constitutional Deprivation In This Case; Proof Of "Deliberate Indifference," Standing Alone, Cannot Suffice.

Supreme Court precedent has made clear that proof of a § 1983 claim against a local government entails evidence of several independent elements, including a policy or custom, deliberate indifference of policymakers in creating that policy as evidenced by a pattern of similar assaultive constitutional violations resulting from the policy, *and a causal link between that policy and the constitutional deprivation actually suffered in the particular case*. Petitioners now ask this Court to retreat from the rigorous requirements set forth in cases such as *Oklahoma City* v. *Tuttle*, 471 U.S. 808; 105 S. Ct. 2427; 85 L. Ed. 2d 791 (1985) and *City of Canton* v. *Harris*, 489 U.S. 378, 109 S. Ct. 1197; 103 L. Ed. 2d 412 (1989), by announcing that the "direct causal link" between a municipal policy and a constitutional deprivation is satisfied by the same proof of deliberate indifference which was required to prove the existence of the policy or custom in the first instance.

In other words, petitioners contend that once the deliberate indifference of policymakers in creating a policy or custom is established, no separate proof of causation is required. Thus, in the circumstances of this case, petitioners would argue that as long they were able to demonstrate that the Sheriff was deliberately indifferent to the dangers inherent in his policies, they would not be required to prove that it was one of these policies which actually caused the injuries sustained by them during the domestic dispute. A Writ of Certiorari should not be granted to so undermine the law developed concerning the function of 42 U.S.C. § 1983. While deliberate indifference is a necessary element of a claim against a governmental entity, contrary to petitioners' argument, it alone is not sufficient.

As Justice Rehnquist warned in *Oklahoma City* v. *Tuttle* concerning the element of causation: "[I]f one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official." (471 U.S., 823) This warning is directly applicable to this case. If the Sheriff did not have a policy of issuing guns to his deputies, Marc Davis would not have been able to use a government sponsored gun to shoot his family. If the Sheriff had taken away Marc Davis' gun, he could not have used it to shoot his family. Yet, there is no "affirmative link" between any act of the Sheriff and the domestic shooting such that it can be said that the Sheriff "caused" the alleged constitutional deprivation. Surely the Sheriff would not have been liable if Davis had used one of his own guns, or the gun issued to his wife.

The opinion of the Michigan Court of Appeals concluding that the requisite causal link was missing in the case at bar is factually and legally correct. Even assuming that petitioners had established a policy evidencing deliberate indifference to constitutional rights, the Court of Appeals rejected the argument that such a policy caused the harm suffered by plaintiffs herein:

> . . . All evidence suggests that the violations herein were caused by personal differences between Davis and his wife. Davis was not acting in the course of his duties as a deputy sheriff and was not acting in furtherance of departmental goals. In fact, the only significant relationship that existed between defendant and the incident was that Davis and his wife were departmental employees and the instrument of deprivation was a department-sanctioned weapon. On this record, there is simply not enough evidence to suggest that defendant's failure to train, supervise, or provide specific services to its employees was the cause of the violations at hand.
>
> (201 Mich. App., 584)

C. Respondent's Alleged Failure To Protect Petitioners From Marc Davis While He Was Acting Solely In His Individual Capacity, And Was Not Acting Under Color Of State Law, Did Not Constitute A Violation Of Any Duty Imposed By The Federal Constitution; No Constitutional Rights Were Implicated And There Could Be No Liability Under 42 U.S.C. § 1983.

In order to impose liability against any defendant under 42 U.S.C. § 1983, it must first be established that that defendant, acting under color of state law, caused the plaintiff to suffer a constitutional deprivation. As this Court stated in *Baker* v. *McCollan*, 443 U.S. 137, 140; 99 S. Ct. 2689; 61L. Ed. 2d 433 (1979), "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" As tragic as this case may be, petitioners were not deprived of any constitutional rights by respondent.

Although this issue concerning the existence of a constitutional right has not been directly raised by the petitioners in the pending Petition, it has been an issue

raised by respondent throughout these proceedings, beginning in the state circuit court and continuing through the respondent's filing of a Cross-Application for Leave to Appeal to the Michigan Supreme Court. Moreover, the issue is implicit in the questions sought to be raised in the Petition: To what constitutional rights was respondent allegedly indifferent? To what constitutional deprivation was the policy or custom affirmatively linked? The existence of a relevant constitutional right has always been merely assumed by the petitioners — it has never been adequately articulated. In fact, there has been no constitutional deprivation in this case and its absence, standing alone, necessarily defeats petitioners' claim.

The facts relevant to this inquiry were not in dispute: When Marc Davis shot and killed his sister-in-law and wounded his wife and brother-in-law, he was not on duty as a Wayne County Deputy Sheriff, nor was he attempting to make an arrest or otherwise enforce the law. There is no dispute that the shooting occurred during the course of a purely domestic dispute. In fact, the only link these shootings had to respondent, Davis' employer, was the fortuity that he utilized his service revolver rather than one of his personal weapons.

Not only would it be unreasonable and violative of public policy to expect the Sheriff to control the off-duty conduct of his employees, but, as specifically relevant to this case, it was not constitutionally required. Although Marc Davis may have used his service revolver in this case, the analysis and result should be no different than if he had used Diana's gun, one which he owned himself, a knife, or his bare hands. The real question is whether the Sheriff had a constitutional duty to protect Marc Davis' family from Marc Davis, and the answer is "no."

The critical distinction between the element of constitutional harm and the other elements necessary for the

imposition of § 1983 liability was discussed by this Court in *Collins* v. *City of Harker Heights*, ___ U.S. ___; 112 S. Ct. 1061; 117 L. Ed. 2d 261 (1992) where it was made clear that the existence of a municipal policy or custom which caused harm to the plaintiff, *even when that municipal policy or custom was the result of deliberate indifference*, did not answer the question of a constitutional violation:

> . . . In this case, petitioner has used that term [deliberate indifference] to characterize the city's failure to train the employees in its sanitation department. We assume for the purpose of decision that the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the city for the tortious conduct of its agents, but that assumption does not confront the question whether the complaint has alleged a constitutional violation. To that question we now turn.
>
> (112 S. Ct., 1068)

In the case at bar, petitioners never did adequately turn to that question, relying instead on the alleged existence of deliberate indifference to satisfy this element.[18] This could not suffice.

The required existence of a constitutional violation by the identified state actor was the element discussed

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18 **For example, in petitioners' July 24, 1992, Reply Brief in the Michigan Court of Appeals, responding to respondent's contention that no constitutional deprivation had been established, petitioners state, at p. 7: "The question comes down to whether the consequence (the harm) is 'fairly attributable' to the State. Thus, the State is deemed to have deprived a person of a protected right, and liability imposed under § 1983, when the State's culpability is established through deliberate indifference. See *Canton* v. *Harris*, *supra*." Moreover, on page 5, note 4 of their Delayed Application for Leave to Appeal to the Michigan Supreme Court, Petitioners specifically stated that "the 'constitutional deprivation' elements rises or falls with 'deliberate indifference' (Issue I B, *infra*), and need not be addressed separately."**

by this Court in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189; 109 S. Ct. 998; 103 L. Ed. 2d 249 (1989) and *City of Los Angeles* v. *Heller*, 475 U.S. 796; 106 S. Ct. 1571; 89 L. Ed. 2d 806 (1986), both of which support respondent's position that it was not legally possible to find him responsible under § 1983 for the injuries which resulted when an off-duty deputy shot the plaintiffs during the course of a domestic dispute. In both *DeShaney* and *Heller*, this Court found the critical element of a constitutional wrong committed by the relevant state actor to be missing, as it is also missing in the case at bar.

In *Heller*, no § 1983 liability against the County was established because the plaintiff failed to prove that an individual officer inflicted constitutional harm on the plaintiff. Likewise, in the case at bar, there was no underlying constitutional deprivation by an agent of the Sheriff acting under color of state law. Marc Davis was not acting under color of state law and thus, his conduct could not suffice to establish the existence of a constitutional duty.[19] As in *Heller*, no § 1983 liability was possible in the case at bar unless the plaintiff could establish a direct constitutional violation committed by either the Sheriff himself, or some agent *other than Marc Davis*.

Contrary to the position taken by petitioners throughout these proceedings, the existence of a policy or custom attributable to the Sheriff did not suffice as the constitutional deprivation. It is at this point in the

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[19] It was only before the Michigan Supreme Court, in order to avoid the conclusion that the element of a constitutional deprivation was missing, that petitioners sought to rely on Marc Davis as the relevant state actor. Indeed, at trial it was their position that the jury should not even be asked to decide whether Davis was acting under color of state law. However, petitioners failed to recognize the distinction between the color of state law requirement, and the independent requirement that the identified "state actor" be responsible for a deprivation of constitutional magnitude. If the "state actor" was the City, what constitutional duty did *it* breach?

analysis that the so-called "duty to protect," and this Court's decision in *DeShaney* becomes relevant because it answers the critical question: Did the Sheriff owe a substantive due process affirmative duty to petitioners?

In *DeShaney*, the Court rejected the plaintiff's argument that Joshua DeShaney's 14th Amendment due process rights were violated by the state when it failed to protect him against his father's violence:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimum levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . .
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.
>
> (489 U.S., 195-197)

Rejecting the *DeShaney* plaintiff's contention that a special relationship existed which imposed affirmative duties of protection on the state which might not otherwise exist, the Court concluded:

> . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.
>
> (489 U.S., 200)

Thus, pursuant to *DeShaney*, a duty to protect exists only where the state affirmatively places the plaintiff in harm's way without the means of protecting himself/herself from the harm. As stated by the *DeShaney* court, it is the state imposed restriction on one's ability to protect oneself which constitutes the deprivation of liberty which may be actionable under § 1983. It is this analysis which is relevant to the case at bar because this is the analysis employed when the physical harm to a plaintiff is not inflicted by a state actor, and it is for this reason that whether or not Marc Davis was a state actor is analytically critical, although petitioners virtually ignored it.

As discussed above, one of the first questions in every § 1983 case is whether or not the governmental entity owed a constitutional duty to the plaintiff. It is only after this question is answered in the affirmative that one must undertake the other inquiries, such as whether or not a policy or custom exists which can be affirmatively linked to the alleged constitutional deprivation, thus satisfying the requirement of *Monell* v. *New York Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018; 56 L. Ed. 2d 611 (1978). In other words, *if* a constitutional duty is owed to

the plaintiff, a governmental entity can breach it and be subjected to statutory liability under § 1983 only through a policy or custom. However, the policy is not itself the constitutional deprivation.

Petitioners' analysis has focused almost exclusively on proof of a policy or custom which allegedly caused or allowed Marc Davis to act as he did. However, they failed to identify a relevant constitutional duty to which this policy or custom could be affirmatively linked and, thus, failed to pass the threshold burden of every § 1983 case.

CONCLUSION

A writ of certiorari should not issue to review the opinion of the Michigan Court of Appeals. That opinion is wholly consistent with this Court's decision in *City of Canton* v. *Harris*, *supra* and no clarification of, or retreat from, the standards set forth in that case is required or justified. Moreover, the insufficiency of the record to support the jury's imposition of § 1983 liability upon the Wayne County Sheriff is manifest.

Respectfully submitted,

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Dated: May 26, 1995

APPENDIX TO BRIEF IN OPPOSITION

• • •

EXCERPT FROM DEFENDANT-APPELLEE'S ANSWER TO DELAYED APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Filed May 7, 1994)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs-Appellants, Cross-Appellees, v MARC DAVIS, THE COUNTY OF WAYNE, and SHERIFF OF WAYNE COUNTY, Defendants-Appellees, Cross-Appellants, and SECOND INJURY FUND, Defendant — SC: 98819; COA: 122594; LC: 84-419385-NO)

* * *

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

This litigation arose as a result of a September 18, 1983 domestic dispute between defendant, Marc Davis, and his estranged wife, plaintiff-appellant Diana Davis, which ended when Marc Davis shot and wounded Diana Davis, shot and killed Diana's step-sister, Kimberly Wilson, and shot and wounded Kimberly's husband, Todd Wilson. Although it is undisputed that Davis was off-duty at the time and was not, in any sense, acting in furtherance of his official duties as a Wayne County Deputy Sheriff when he argued with his wife and shot his family, the plaintiffs sought to hold the Sheriff's Department *constitutionally* liable because the gun utilized by Davis was his department issued weapon and, it was alleged, the Department should have determined that Davis was mentally unstable and then should have

relieved him of his weapon at some point prior to the shooting.

As originally filed, the complaint alleged only a negligence theory of liability against Marc Davis and Wayne County. Plaintiffs added Sheriff Robert Ficano as a defendant, in his official capacity as head of the Wayne County Sheriff's Department, in their First Amended Complaint, alleging both negligence and 42 USC § 1983 theories of liability against him. However, on motions for summary disposition the circuit court dismissed plaintiffs' negligence claims against both Wayne County and Sheriff Ficano on the basis of governmental immunity (MCLA 691.1407 *et seq*). An order was entered on December 17, 1986, dismissing Wayne County from the litigation because the only claims directed against the County had been negligence claims, subject to the county's governmental immunity defense. Although concluding that plaintiffs' First Amended Complaint did not adequately state a 42 USC § 1983 claim against the Sheriff, it permitted plaintiffs the opportunity to amend their complaint. (Tr 12/12/86, 21-22, 49-51)

On January 7, 1987, plaintiffs amended their 42 USC § 1983 claim against the Sheriff, complained that their injuries had been caused by policies and practices of the Sheriff's Department, and alleged that the department did not adequately train its deputies concerning stress, that it failed to conduct ongoing psychological testing of its deputies, that it did not adequately supervise, train or discipline its deputies (including Marc Davis), and that it followed a "code of silence" with regard to unlawful conduct of its deputies. Defendant thereafter repeatedly and unsuccessfully moved for summary disposition, contesting the legal sufficiency of plaintiffs' § 1983 claim, and arguing, *inter alia*, that the § 1983 requisite elements of "color of state law" and/or a constitutional deprivation were missing in this case.

Following the plaintiffs' dismissal of Marc Davis, this case proceeded to trial against the only remaining

defendant on the only remaining theory of liability — that the Wayne County Sheriff's Department had violated plaintiffs' constitutional rights under the 5th and 14th Amendments to the United States Constitution by depriving them of life, liberty and property without due process of law. At that trial, plaintiffs attempted to establish that Marc Davis was not fit for duty, that the defendant should have known of the incidents which indicated his unfitness for duty and that, with that knowledge, it should have taken away his gun.

At trial, plaintiffs specifically argued that the defendant should have (1) conducted pre-hiring psychiatric screening of applicants for deputy sheriff positions; (2) conducted annual, written performance evaluations of all departmental employees; (3) instituted a counseling program specifically geared to the unique needs of deputy sheriffs; and (4) discovered and investigated incidents of conduct/misconduct committed by Marc Davis (including his marital problems with Diana Davis) by breaking the alleged "code of silence" existing within the department and taking appropriate disciplinary action against Davis. It was their position that the fact that Davis was off-duty and not exercising his police powers when he shot plaintiffs during a domestic dispute did not bar their § 1983 claim.

Defendant argued that it did not know and could not have known of many of the incidents of alleged aberrant behavior relied upon by plaintiffs to demonstrate Marc Davis' mental instability and that it had investigated those few incidents which were reported. It further argued that the incidents were isolated, occurred sporadically throughout the course of Davis' 8 year career with the Sheriff's Department, and, even if known, would have given no indication that Davis was unfit to carry a gun or that he would use his gun off-duty to shoot his family members during a domestic dispute. Defendant denied that pre-hiring psychiatric screening, written performance evaluations, or a deputy sheriff

specific counseling program would have prevented the shootings in this case, and denied that it ever adopted or condoned a "code of silence" concerning improper conduct committed by deputies. Moreover, it denied that it had either a duty or a right to pry into its employees' personal affairs unless the employee reported the problem or the personal problem affected the employee's job performance: Neither of those indicia were present in this case. Defendant further maintained that the shooting was the culmination of a purely personal conflict of which it had no knowledge and that, under the circumstances of this case, it could not be held responsible for a wrong of constitutional magnitude.

The case proceeded to trial, during which plaintiff presented evidence concerning (1) the relationship between Marc Davis and Diana Davis; (2) the shooting incident itself; (3) other incidents of alleged aberrant behavior involving Marc Davis; and (4) alleged "policies" or "customs" of the Department which, it was contended, could be causally linked to the shooting of plaintiffs. No attempt was made to prove the existence of wrongdoing, similar or otherwise, by other Wayne County deputies.

Relationship Between Marc and Diana Davis

Marc and Diana Davis met in October of 1976, and were married seven months later on May 28, 1977. (Tr 5/3/89, 125, 134; Tr 5/8/89, 20-21) Diana described Marc as having been a "perfect gentleman" during the period prior to their marriage: he never displayed a temper or appeared jealous and had never been physically aggressive. (Tr 5/3/89, 132, 135-136; Tr 5/8/89, 21) However, while on their honeymoon Marc struck Diana for allegedly flirting with another man and the arguments and physical fights between them escalated over the course of their marriage. Marc constantly accused her of having affairs and physical violence sometimes

erupted during these arguments. Diana testified that Marc would hit her if she responded in a way he did not like, or if he did not like her answers. (Tr 5/3/89, 136-138, 140; Tr 5/4/89, 66; Tr 5/8/9, 35) Diana also admitted that she knew how to make Marc angry, i.e. she "knew which string to pull" and "which buttons to push" and she knew how he would react in an argument. (Tr 5/8/89, 38)

During their marriage, the Davis' had two children and a major source of contention within the marriage was Diana's desire to continue working. Although Marc wanted a "traditional" family where the wife stayed home and cared for the children, Diana did not agree. Although she quit her job in 1978 before their first child was born, after the delivery she wished to return to work and Marc reluctantly agreed, but only if she obtained a job with the Wayne County Sheriff's Department. (Marc had been a Wayne County Deputy Sheriff since 1975.) (Tr 5/3/89, 143-145; Tr 5/8/89, 22-24, 68-69) Classified as a Police Officer I, Diana began working at the Westland annex of the Wayne County Jail in May of 1979. Although Marc was often assigned to work in the same jail annex, they were never assigned as partners and had little contact with each other. (Tr 5/3/89, 150; Tr 5/8/89, 23-24)

On August 1, 1983, Diana reported to the police academy to begin her training to become a fully certified police officer. She testified that Marc was not happy that she was attending the academy because her job as a deputy sheriff would give her more independence. (Tr 5/4/89, 27, 77) Marc never liked the fact that Diana was working and would be particularly upset if she was not home when he arrived home from his afternoon shift. Diana testified that she would go out drinking with her friends and co-workers after her afternoon shift and the Davises' discussions on this subject sometimes led to arguments and fights. (Tr 5/3/89, 161; Tr 5/8/89, 32-34, 69-70)

Describing their fights, Diana testified that Marc always struck her with an open hand, would occasionally choke her, and that she always fought back vigorously, hitting and scratching. (Tr 5/3/89, 140, 143; Tr 5/8/89, 38-39, 61) She described two instances when Marc pulled a gun on her: In 1978, during an argument while she was pregnant, Marc struck her a few times and then pulled out his gun, put it to her head, and then choked her until she lost consciousness. (Tr 5/3/89, 142-143) The second instance occurred in 1982 or 1983, when Marc struck her a few times, threw her on the bed, pointed a gun and told her to remove her clothes. When she refused, he tore off her clothes and raped her. (Tr 5/4/89, 66-67; Tr 5/8/89, 25-32)

Diana testified that Marc owned several shotguns and handguns in addition to the three service revolvers issued to him by the Sheriff's Department. She stated that she never thought that he would shoot her, even on the night of the shooting. (Tr 5/4/89, 79, 117; TR 5/8/89, 27-29)

In May, 1983, Marc struck Diana in front of their children for the first time and Diana moved out of the house because she did not want her children to believe that it was all right to hit or be hit. She moved in with her step-sister, Kimberly Wilson, and Kimberly's family. Several weeks later, Marc agreed that the children could move in with Diana. (Tr 5/3/89, 139-140; Tr 5/4/89, 57-58; Tr 5/8/89, 39) During this period, Diana allowed Marc to pick up the children whenever he wanted and she never worried about their safety with him. He would see Diana two or three times a week, swear that he would change and beg her to come home. When she refused, an argument sometimes followed. On a few occasions, Diana went with the children to visit Marc, and she also saw Marc alone and had sex with him a few times, including the night before the shooting. (Tr 5/3/89, 59; Tr 5/4/89, 61, 64; Tr 5/8/89, 37-40) A few days before the shooting, Marc agreed to give her a divorce and custody of the children. (Tr 5/4/89, 59-60)

During the latter stages of their marriage both Marc and Diana were seeing other people. (Tr 5/8/89, 67) Diana described one occasion when she found a phone number in Marc's pocket, threatened to call the number, heard Marc pick up the phone and she beat him with it. (Tr 5/8/89, 61-63) Diana admitted that she was "romantically involved" with her long-time friend and confident, police officer Dan Longy and that, although Marc had accused her of infidelity, she had never admitted to it. (Tr 5/8/89, 35-37, 54)

Although Diana testified that she once suggested marriage counseling to Marc, he rejected the idea because he did not need someone telling him what his problems were. Diana did not seek counseling for herself because she did not believe that she needed it. (Tr 5/3/89, 142; Tr 5/4/89, 108; Tr 5/8/89, 58-59) Both plaintiffs' and defendant's psychiatric experts agreed at trial that Marc and Diana had a sadomasochistic relationship, explaining that Diana was a verbally aggressive person who provoked Marc, while Marc was a passive personality who reacted violently when he lost control. (Tr 5/1/89, 88-89; Tr 5/2/89, 29-30; Tr 5/15/89, 33-36, 149)

Extent of Co-Workers' Knowledge of Domestic Problems

Throughout their employment at the Sheriff's Department, neither Marc or Diana volunteered or disclosed anything about their marital problems to their supervisors. They discussed their physical fights only with a few co-workers who never formally reported the Davises' personal problems.

While on special assignment with the Marine Division patrolling the Detroit River, Marc was partnered with Larry Davis.[1] Beginning in April of 1983, Marc told Larry

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[1] **In fact, Marc received this appointment after application and an interview and was rated the most qualified applicant. (Tr 4/24/89, 107, 167-169)**

Davis that he was having a lot of marital problems and Larry Davis testified that Marc would be happy one day and sad the next, depending on how Diana was treating him. Marc confided to Larry Davis that he and Diana had physical fights and once began to cry, asking Larry Davis to hit him because he had hit Diana. (Tr 4/24/89, 115-117, 120-122, 128, 131) Larry Davis also testified that, against his advice, Marc (an ex-Marine) enlisted in a two-week Marine Corps training program in early August of 1983, in order to escape his problems and that when he returned, Marc confided that he had started to drink on the job. Larry Davis encouraged Marc to get a divorce. (Tr 4/24/89, 121-122, 125-126, 128, 131, 139; Tr 5/16/89, 30-31)

Larry Davis repeatedly testified that Marc's work performance was excellent and was, in no way, affected by his personal problems. He did not report Marc's marital problems to their supervisors because they were not affecting his job performance and were, therefore, none of the Department's business. He stated that Mark was trying to work out his problems on his own. (Tr 4/24/89, 116-127, 141) The day before the shooting, Marc had just had a fight with Diana when he helped Larry cut down a tree, splitting wood for 1½ hours without stopping. Although his hands were blistered and bleeding, he was in a much better mood. (Tr 4/24/89, 132, 142-143)

Diana testified that she did not volunteer or disclose any of her marital problems or physical fights with either her own or Marc's supervisors because she was afraid that it would jeopardize Marc's job and her own chances of successfully completing the police academy, although no one had ever told her she would lose her job if she reported fights. (Tr 5/4/89, 72-73, 120; Tr 5/8/89, 64, 68) She covered her bruises with makeup and sunglasses and while, occasionally, someone would remark about the bruises, she confided her marital problems only to two co-workers, Claire Parnell and Christine Dennard. (Tr 4/18/8, 108; Tr 5/2/89, 104,119; Tr

5/4/89, 72-74) She also casually told Sergeant Jim Reed, who was both a supervisor and a friend, that she and Marc had quarrelled and separated. According to Diana, she confided that information to Sergeant Reed only "as a friend". (Tr 4/27/89, 58, 77, 81; Tr 5/4/89, 119; Tr 5/8/89, 57-58)

None of these three officers reported Diana's problems to their supervisors. Deputy Parnell testified that she did not report the black eye and swollen lip she had observed on two or three occasions prior to May, 1981, because of Diana's assurances that she could handle the matter. (Tr 5/2/89, 104-105, 111-112) Likewise, Deputy Dennard saw no need to report the bruises she saw on three or four occasions between 1978 and 1982. (Tr 5/8/89, 71-75) Sergeant Reed explained that he felt that he had nothing to report since Diana did not say anything specific to him, he never saw any signs of physical abuse, and Diana did not ask him to make a report. (Tr 4/27/89, 57-60, 66, 68, 80-82)

In September, 1983, Diana's drill instructor at the academy, Officer Ron Proudlock of the Livonia Police Department, learned from a student that Diana had suffered an injury. When he called Diana into his office she did not appear distraught, but was wearing sunglasses and had some facial injuries. Although initially stating that she fell, she later admitted that she was having marital problems. Officer Proudlock knew about Diana's involvement with Officer Longy and believed that Diana was getting a divorce. He did not mention Diana's relationship with Officer Longy because he felt that it was none of his business. (Tr 4/18/89, 103, 108, 115-119, 123, 127; Tr 5/4/89, 73) Officer Proudlock escorted Diana to the offices of Sergeants Henry Hammond and Bobby Hawkins, employees of the Sheriff's Department. (Tr 4/18/89, 108-110, 127) He could not recall what he said to the sergeants, or their responses, and did not know what Diana told them after he left. (Tr 4/18/89, 116, 120, 126-128) He did not file a written report because he felt

that the sergeants could handle the matter, and that it involved personal, marital problems; he noticed no further injuries and heard of no further incidents. (Tr 4/19/89, 120-124) Sergeants Hammond and Hawkins could not recall the incident, but both testified that they would have reported any physical abuse if they had noticed it. (Tr 4/27/89, 92-93; Tr 5/16/89, 7-8, 14-15) Diana testified that she had reported an injury once while she was at the academy, but did not say to whom. (Tr 5/4/89, 73)

Subsequent to this incident, Diana approached Sergeant Jan Hartwell, the academy's training director, to explain that her grades at the academy were not up to par because she was having some unspecified family problems. Sergeant Hartwell testified that she noticed no bruises or signs of physical abuse on Diana. (Tr 4/19/89, 76-77, 96)

THE SHOOTING

During the evening of September 17, 1983, while off-duty, Marc Davis telephoned the Wilson home and told them that he would be stopping by to pick up his children. When he arrived at the Wilson home between 11:00 and 11:30 p.m., Diana was not there because she was at Officer Longy's house. When the Wilsons brought the children to Marc's car, he told them that he wanted to talk to Diana. (Tr 5/2/89, 79-82; Tr 5/8/89, 39-41, 59-60) Kimberly Wilson then called Diana at Officer Longy's and Diana returned home and called Marc. Although she refused to go with him for a drink or a cup of coffee, she agreed to talk to him, and Marc returned to the Wilson's home where Diana met him outside. (Tr 5/2/89, 82-83; Tr 5/3/89, 73-74; Tr 5/8/89, 40-41)

After being told by Kimberly that Marc was trying to force Diana to leave with him, Todd went outside to ensure that Diana was all right and found them involved in a physical fight. Todd intervened, threatened Marc, and was told by Marc to return to the house or he

would get hurt. Diana reassured Todd that Marc could not force her to leave because she had his car keys and Todd returned to the porch of the home and observed Marc and Diana talk in Marc's car. (Tr 5/2/89, 77, 83-85; Tr 5/3/89, 65-67, 68, 80-82, 91-92; Tr 5/10/89, 9-12)

Diana testified that Marc wanted her to come home but that she refused to do so until she saw a change in him. At one point he handed her his department issued .357 Magnum and asked her to kill him. She returned the gun to him. (Tr 5/4/89, 60, 116; Tr 5/8/89, 41-42) In the meantime, Kimberly had called the Garden City Police and Officer John Sanborn responded to the call, having been informed that the situation involved family trouble and possibly a gun. When he arrived at 12:45 a.m., Officer Sanborn observed Diana and Marc in Marc's car which was parked in the driveway. (Tr 4/19/89, 10-12, 54-55; Tr 5/2/89, 85; Tr 5/8/9, 64) According to Diana, she told Mark to hide his gun, and he did so. (Tr 5/8/89, 42-43)

When Officer Sanborn approached the driver's side (where Diana was seated) he saw Marc and Diana in a heated, but not hostile, domestic quarrel and informed them that he had been called because of family trouble possibly involving a gun. (Tr 4/19/89, 12-13, 54-55) Marc identified himself as a deputy sheriff and produced his badge and driver's license. Diana likewise identified herself as a deputy sheriff. (Tr 4/19/89, 13-14, 43-44, 55, 66) Since Officer Sanborn was worried that Marc was holding a weapon on Diana, he asked her to step out and to the rear of the car, and asked her how the situation was and if she wanted him to stay until Marc left. (Tr 4/19/89, 13, 56-59; Tr 5/8/89, 44-45) However, Diana assured him that everything was fine, that there was no danger, that she could handle the situation, and that there was no reason to stay. (Tr 4/19/89, 13, 59; Tr 5/8/89, 45)

Other police vehicles arrived and Todd Wilson talked to these officers, informing them that he did not want

to press charges against Marc, but that Diana might want to do so. These officers then joined Officer Sanborn and spoke to both Marc and Diana. (Tr 4/19/89, 60; Tr 5/2/89, 86-87; Tr 5/3/89, 68-69)

Although Marc told Officer Sanborn that he had a gun, Sanborn saw no gun. He testified that he would have arrested an ordinary citizen who was carrying a gun without a permit but that both Marc and Diana, as deputy sheriffs, were authorized to carry guns 24 hours a day. (Tr 4/19/89, 14-15, 33, 55, 57, 62) However, Officer Sanborn also testified that he would have taken some action against Marc, regardless of his status as a deputy sheriff, if Diana had been in any danger. (Tr 4/19/89, 56, 58, 61) Based on Diana's assurances that all was fine, the officers left the scene after about 10 or 15 minutes. (Tr 4/19/89, 13, 15, 44, 61; Tr 5/2/89, 86-87)

After the officers left, Diana returned to Marc's car while Todd observed them talking and yelling. When Diana returned to the house, she laughingly stated that Marc had threatened to "blow her away" if she left the car. (Tr 4/19/89, 49; Tr 5/2/89, 87-88; Tr 5/3/89, 74-76; Tr 5/8/89, 46-47)

Marc began to back his car out of the driveway, but stopped and pulled forward to Diana's car. He left his car and went to Diana's, opened her trunk and began to throw her belongings across the lawn. Diana then ran toward him, hitting and scratching him and tearing at his shirt. Todd and Kimberly Wilson were outside helping Diana pick up her things. Discovering Diana's .39 caliber service revolver in the trunk of her car, he asked whose gun it was and when Diana told him that it was hers, he threw it across the lawn. As the exchange was escalating, Todd Wilson walked Diana back a few feet, Kimberly Wilson began screaming at Marc, and Kimberly and Diana began picking up things from the lawn. (Tr 4/19/89, 49-50; Tr 5/2/89, 88-93; Tr 5/3/89, 77-78; Tr 5/4/89, 77, 115; Tr 5/8/89, 47-52)

Marc then went to the glove box of Diana's car and pulled out his .38 caliber service revolver which he kept in her glove box because he used her car several times a week. He returned toward his own car with the revolver in his hand, apparently intending to leave, when Diana and Kimberly began yelling at him again. Knowing that her threats would upset Marc, and later admitting that she had pushed one button too many, Diana screamed, "I'm going to take your job, your house, your kids, everything you ever worked for." Marc then stared at her in way that she had never seen before, assumed a combat stance and fired point blank at Diana. He then turned and shot both Todd and Kimberly Wilson. (Tr 4/19/89, 50; Tr 5/2/89, 93-97; Tr 5/3/89, 78; Tr 5/4/89, 78-79; Tr 5/8/89, 38, 52-53; Tr 5/15/89, 41)

"Incidents" Involving Marc Davis

Reckless Driving Ticket. Marc received a reckless driving ticket in 1969, five years before he was hired by the Sheriff's Department. The circumstances of the ticket were never detailed at trial. (Tr 4/24/89, 76-77, 99)

Marine Corps Experience.

Marc successfully served in the Marine Corps before applying to the Sheriff's Department. (Tr 4/24/89, 127)

Chicken Blood Incident.

In 1975 or 1976, Deputy Bill McGhee and a few other deputies saw Marc coming out of the kitchen at the Detroit House of Corrections with blood on his hands and pants. Marc said that he had been helping the cook kill chickens. McGhee did not report this incident and did not believe that it was indicative of a propensity for violence. (Tr 5/2/89, 113-119)

Wedding Incident.

During Marc and Diana's May, 1977 wedding reception, Marc drank champagne from his shoe and insisted that the band play the "Marine Corps Hymn." He became verbally abusive to the band when they refused to play it. (Tr 5/8/89, 85)

Belleville Restaurant Incident.

Sometime between 1978 and 1980, Marc intervened in a fight between a couple in a Belleville restaurant while he was off-duty. (Neither the nature of the fight nor the nature of Marc's intervention was detailed at trial.) The Belleville police notified the Sheriff's Department of the incident and the Department conducted an investigation. No complaint was filed by the couple involved in the incident and, after its investigation, no action was taken by the Department against Marc Davis. (Tr 5/2/89, 48-49, 52-54; Tr 5/16/89, 58-59)

Prisoner Beating Incident.

Sometime between 1978 and 1980, Deputy Teresa Vasquez observed a prisoner being placed in a cell near the intake area where problem prisoners were isolated. She saw Marc enter the cell and heard blows being exchanged between the two men. Deputy Vasquez never reported the incident, although she knew that Department rules forbade such conduct and that she had a duty to report it. She explained that she thought that she would not have been able to function effectively with the male deputies if she made a report. Although Deputy Vasquez stated that several other deputies were present in the area, no one else testified to this incident at trial and the prisoner did not file a complaint or otherwise report the incident. (Tr 4/25/89, 176-179; Tr 4/26/89, 62-64, 68, 151-152, 164-167)

Locker Incident.

Sometime between 1978 and 1981, Deputy Louis Elias noticed a bullet hole near the bottom of his department locker. His briefcase, which had been inside the locker, was damaged as a result. No one had witnessed or heard a gun discharge in the locker room but Deputy Elias believed that Marc Davis was responsible. When he confronted Marc and asked him to pay for the briefcase, Marc did not admit responsi-

bility but did pay for the briefcase. Deputy Elias did not file a report and explained that Marc had paid him for the briefcase and that he did not have enough information to file a report. (Tr 4/25/89, 146-156)

Inmate Incident.

Sometime between 1978 and 1982, Marc Davis was hit by an inmate while on duty. The inmate was taken to the intake area of the jail annex where Deputy William Wensko was working. The supervisor, Lt. Lewis Bryant, ordered Deputy Wensko not to allow Marc to come near the prisoner. When Marc arrived soon thereafter he was loud and agitated because he wanted to have an "understanding" with the inmate. When told that Lt. Bryant had ordered that he not have contact with the prisoner, he left the area without further incident. Deputy Wensko did not report the incident because Marc did not get near the prisoner and went back to his assignment without problem. (Tr 4/25/89, 32-34,57-59, 69)

Cafeteria Incident.

Sometime between 1978 and 1982, Deputy Wensko observed Marc talking to another deputy, Bill Osbourne, in the jail annex cafeteria. Marc pulled out his gun and put the barrel against Deputy Osbourne's buttocks. Deputy Wensko did not know what was going on but he stated that Marc did not appear to be "kidding around". He did not report the incident because "it was none of his business", he did not want to "make waves" and he did not consider the incident "way out of line". (Tr 4/25/89, 30, 35, 60-61, 63, 69)

Prisoner Petition Incident.

In February of 1980, Marc filed an incident report concerning an inmate, Lewis Smith, because Mr. Smith refused to put on his shirt and pants for breakfast, was verbally abusive to Marc, and incited the other inmates. Mr. Smith and 14 other inmates responded

with a handwritten "formal grievance", which they submitted to the Department. The inmates complained that Marc treated them in a demeaning and degrading manner, was neglectful of his duties, changed the rules to fit his whim, would not allow them to watch television one night, and would not allow Mr. Smith to have breakfast because he was not properly dressed. (Tr 4/27/89, 56, 71-74; Exhibit 16) Lt. Bryant filed a report on the matter, recommending that no disciplinary action be taken against Mr. Smith but that he and another prisoner be relocated. He also noted that inmates were not required to be dressed for breakfast and that "normal procedures were not followed". (Exhibit 16; Tr 4/27/89, 76) Peter Wilson, the jail administrator, recommended further investigation into the prisoners' petition and, in the meantime, assigned Marc to the master control area where he would have limited contact with inmates. (Tr 4/27/89, 74-77, 86)

Choir Practice Incident.

Deputies Wensko and Gulick testified to an incident that occurred in late 1980 or early 1981 during "choir practice", i.e., a social gathering of deputies and civilians after work, which sometimes occurred outside on county property. (Tr 4/25/89, 36-37, 61-62; Tr 5/8/89, 83) The deputies testified that they, Marc, and a few other deputies met after work at the baseball field near the jail annex and were drinking. Officer Wensko testified that Marc was drinking, although Deputy Gulick was not sure. At some point, Marc rode his personal motorcycle up a nearby steep hill and collided into either a cement wall or a pile of debris at the top of the hill. Marc was not injured. No report was made of the incident. Officer Wensko explained that there was nothing to report because Marc's conduct was not "way out of line", did not constitute conduct unbecoming an officer, and the incident had no effect on Marc's ability to perform his job. (Tr 4/25/89, 37-39, 62-63; Tr 5/8/89, 83-84)

Pay Check Incident.

Sometime prior to May of 1981, Deputy Claire Parnell was working with Diana Davis at the downtown jail when Marc approached her and asked for her paycheck. When Diana refused, Marc stated that he would "beat her ass" if she did not give him the check. Deputy Parnell said that Marc was not going to beat Diana in front of her and when Marc did not leave, Deputy Parnell telephoned an unnamed sergeant who told her to put Marc on the phone. Marc left after speaking to the sergeant. There was no written report of this incident. (Tr 5/2/89, 105-107, 111, 166-167)

Workers Compensation Incident.

In 1981, Diana picked up Marc at work and took him to the hospital because he had broken his hand when he hit a car window. Marc was not on duty at the time, but he did receive workers compensation. Diana did not observe how Marc injured his hand and no other witness testified to the incident. (Tr 5/4/89, 71-72, 117-118; Tr 5/16/89, 81)

In addition to these specific incidents during his 8 year career with the Sheriff's Department, plaintiff also produced evidence concerning Marc's nickname and personality. Marc was nicknamed "Macho" and was described by his co-workers as cocky, arrogant, self-confident and abrasive. A few co-workers stated that Marc sometimes spoke demeaningly to inmates and other deputies, although no one reported that attitude problem to supervisors. He was also described as a deputy who always "went by the book", i.e., he insisted that others follow the rules and he would not give people a break if they violated them. (Tr 4/26/89, 130-131, 150-151, 172-173; Tr 4/27/89, 45-47, 69-71, 79-80; Tr 5/1/89, 55; Tr 5/2/89, 22; Tr 5/8/89, 29, 81, 154-155, 168-169)

Alleged Policies and Customs of the Department

Pre-Hiring Psychiatric Screening

The process of hiring deputies for the Sheriff's Department is handled both by the Civil Service Commission and the Sheriff's Department. Civil Service processes the applications for deputy positions, conducts written tests, and compiles the list of top candidates from which the Sheriff's Department must select. The Sheriff's Department then conducts physical agility tests, performs an extensive background check, and orally interviews each candidate. After the applicant is hired, he/she is sent to a police academy to receive the training necessary to become a state-certified deputy sheriff. (Tr 4/20/89, 28-29, 32-33; Tr 4/24/89, 8-11, 67-69; Tr 5/3/89, 13-15, 36)

When Marc Davis was hired in the mid-1970's, mandatory psychiatric screening of deputy candidates was not conducted by Civil Service, the Sheriff's Department, or the police academy. It is/was not mandated by the state. (Tr 4/19/89, 80; Tr 4/24/89, 12-14, 37-41, 56; Tr 5/3/89, 33-35)[2]

Annual Written Performance Evaluations

At least two written performance evaluations of deputy sheriffs are conducted by the Sheriff's Department during their first year of probation and, in fact, two such evaluations were prepared during Marc Davis' probationary period. (Tr 4/24/89, 17-20; Tr 5/3/89, 15-16; Tr 5/10/89, 70) During Marc's career the Sheriff's Department did not perform periodic written evaluations of deputies after they successfully completed their proba-

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2 None of the experts who testified at trial opined that Marc Davis would have been deemed an unsuitable candidate for police work if he had been subjected to pre-hiring psychiatric screening. Defendant's expert stated that he would not have been disqualified while plaintiff's expert noted that Marc did not begin developing problems until after he was hired. (Tr 5/15/89, 20; Tr 5/8/89, 64)

tion. Although the Department had tried to institute such a procedure in the late 1970's, the deputies' union successfully challenged the procedure as discriminating against uniformed personnel and the Department was not able to adopt the evaluation procedures used by other County departments until 1986 or 1987. (Tr 4/24/89, 17-21, 56-58, 70-72, 91; Tr 5/3/89, 15-16) The Department did have a policy of supervising, monitoring and evaluating deputies on a daily basis, requiring that all significant problems be reported and investigated, and taking appropriate disciplinary action when warranted. (Tr 4/20/89, 14; Tr 4/24/89, 38, 58-61, 78-79, 158)[3]

Specific Counseling Program for Deputy Sheriffs

There was no dispute that at all relevant times a counseling program was available for deputy sheriffs. Prior to 1986, however, the counseling program was not exclusively geared to deputy sheriffs but was a county-wide counseling program — the Employees Assistance Program (EAP). (Tr 4/20/89, 7-8, 11, 62-67, 97-99; Tr 5/10/89, 73) The EAP was staffed by volunteers, who would refer any county employee (including deputies) to the type of professional counseling services they required (e.g., financial, alcohol and substance abuse, psychological/psychiatric counseling, etc). Deputies who sought assistance through the EAP were encouraged to use, and in some cases were directly referred to, the Detroit Police Department's counseling program, which was operated by the Multi-Resource Center

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[3] **Although plaintiffs' expert testified as to the desirability of written performance evaluations, there was no state or federal regulation mandating them and no specific evidence was presented by plaintiffs as to how such evaluations would have uncovered more information about Marc Davis than the Department had. Defendant's law enforcement expert concluded that even if there had been written performance evaluations, they would not have provided sufficient information to warrant removing Marc's police powers. (Tr 5/16/89, 52-53)**

(MRC) and was law enforcement officer specific counseling. (Tr 4/19/89, 99-100; Tr 4/20/89, 15-16, 77-80; Tr 4/25/89, 123)

Plaintiffs contended that the Sheriff's Department, which, in 1986, completed its negotiations and funding for a counseling program run by MRC and geared exclusively to deputy sheriffs, should have adopted such a program earlier. However, the only significant differences between the EAP and MRC programs established at trial were (1) the contact person for the latter program was an MRC employee, and (2) deputy sheriffs were always referred to professionals who were acquainted with the unique needs of police officers. Under either program, the Sheriff's Department could require deputies with specific problems that affected their work to go to counseling and supervisors were trained to look for abnormal behavior which might indicate problems. Under either program, referrals to counseling would not be required for purely personal problems which did not affect job performance. (Tr 4/19/89, 101-102, 146-149; Tr 4/20/89, 5-16, 84, 98; Tr 5/10/89, 72)

Plaintiffs presented no evidence concerning the effectiveness of the EAP. The only testimony in this regard was that the rate of usage of EAP and MRC services was nearly identical, with 3-5 referrals per month. (Tr 4/25/89, 135, 140)

"Code of Silence"

The Sheriff's Department officials and supervisory personnel, as well as the parties' experts, recognized that all police officers have a very natural inclination not to "snitch" on fellow officers because they are a very close group of people who work together in potentially dangerous situations where their partners could save their lives. (Tr 4/20/89, 52-53, 165-168; Tr 4/24/89, 71-72, 154, 161-163; Tr 4/25/89, 78-79; Tr 4/26/89, 103, 144-145, 154-155; Tr 4/27/89, 63, 82-84; Tr 5/8/89, 14-15, 162-163; Tr

5/16/89, 50) Plaintiffs referred to this natural propensity as the "code of silence".

However, there was no evidence that the Sheriff's Department had a formal written policy adopting or condoning a "code of silence" and all of the departmental personnel testified that there was no informal custom or policy of ignoring or condoning officer misconduct. (Tr 4/20/89, 165-166; Tr 4/24/89, 97, 137. 161-164, 170-171; Tr 4/25/89, 155; Tr 4/26/89, 104, 154-155, 163-164; Tr 4/27/89, 78-79, 82-84; Tr 5/15/89, 87-88) In fact, the Sheriff's Department had specific portions of their training program and written documents devoted to teaching supervisors how to observe and deal with deputies, ascertain problems, and report accurately, and this training of supervisory personnel was consistent with the recommendations of plaintiffs' law enforcement expert. (Tr 4/20/89, 72-73,168-169; Tr 4/24/89, 155, 162-163; Tr 4/26/89, 148-149)

Defendant's law enforcement expert observed that if the Sheriff's Department had a "code of silence", there would be no requirements for reporting misconduct or disciplining officers. (Tr 5/26/89, 102-103) However, the undisputed evidence demonstrated that the department required that all misconduct be reported and investigated, with appropriate discipline when warranted. (Tr 4/20/89, 41-43, 106-107; Tr 4/26/89, 154-155; Tr 4/27/89, 52, 83-84; Tr 5/10/89, 72) The testimony established that reports and investigations were specifically required for, *inter alia*, serious verbal confrontations with beating of prisoners,[4] prisoner complaints,[5] accidental/intentional discharges of weapons,[6] incidents involving deputy

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4 Tr 4/26/89, 63-64, 67, 142-143; Tr 4/27/89, 53-54, 87-89; Tr 5/10/89, 71.

5 Tr 4/26/89, 151-153, 165-167, 175.

6 Tr 4/20/89, 48-50, Tr 4/24/89, 83-86, 99-100; Tr 4/25/89, 150-151, 156-157, 165-167; Tr 4/26/89, 137-138; Tr 4/27/89, 49-50.

sheriffs which were reported by other police agencies,[7] and drinking on the job or on county property.[8] The Department also had a policy of reporting off duty behavior that could be considered conduct unbecoming an officer.[9]

At best, plaintiff presented evidence from its law enforcement expert that he had ascertained in his discussions during training seminars with supervisors from the Wayne County Sheriff's Department that they were just trying to get through the day, and did not want to hear, look for, or worry about anything. (Tr 5/8/89, 4, 88-90, 95-97) One Wayne County deputy sheriff felt that it was useless to file complaints against other deputies, or that certain supervisors did not want to be bothered with complaints unless they were serious. However, that deputy admitted that departmental policy was to report misconduct and that an investigation would occur if a report were filed. (Tr 4/25/89, 56, 65-66, 71-72) Another deputy complained that her supervisor did not take any action when a deputy once pulled a gun on her for turning off a radio. (Tr 4/25/89, 190; Tr 4/26/89, 64-65, 94, 97-98) On another occasion, a supervisor stopped a fight between an inmate and a deputy, but no further action was taken. (Tr 4/25/89, 179-180) These two incidents were the only ones presented concerning a supervisor not reporting misconduct observed which arguably should have been reported.

As to complaints concerning deputies physically abusing their spouses, the Department's supervisory personnel agreed that if Diana Davis had reported the incidents of physical abuse and requested the Department to take action against Marc, the Department would have had a duty to investigate the matter and take

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7 Tr 4/20/89, 37-38; Tr 4/25/89, 20-21.

8 Tr 4/20/89, 51; Tr 4/24/89, 157, 173.

9 Tr 4/20/89, 13-14, 75; Tr 4/25/89, 69.

appropriate counseling or disciplinary action. (Tr 4/20/89, 5, 84, 106-107; Tr 4/24/89, 171, 173; Tr 4/25/89, 19-20) However, that did not occur because Diana did not want the Department to know of her domestic problems.

The supervisory personnel further agreed that the Department would have had a duty to investigate, counsel, and perhaps discipline Marc if the Department had learned that Diana was being physically abused, even if Diana did not request such assistance. (Tr 4/19/89, 115; Tr 4/20/89, 41-43, 84, 106-107; Tr 4/25/89, 23-24; Tr 4/27/89, 66, 78, 92; Tr 5/8/89, 18-19, 100-101; Tr 5/15/89, 76; Tr 5/16/89, 14-15, 84-85, 119-120) However, none of Marc and Diana's problems were reported up the chain of command prior to the shooting. (Tr 4/20/89, 19-21, 43-44, 83; Tr 4/25/89, 75, 167-168) When, after the shooting, the Department learned of the various rumors involving Marc Davis, an investigation was conducted to learn why those rumors did not flow up the chain of command. (Tr 4/20/89, 46-47, 85-86)

Verdict and Appeal

The jury returned a verdict imposing 42 USC § 1983 liability on defendant and awarding $803,416 to Diana Davis, $651,702 to Kimberly Wilson's estate, and $50,000 to Todd Wilson. The judgment was entered on June 13, 1989, and the plaintiffs' motion for additur, or in the alternative a new trial, was denied by order dated June 13, 1989. Defendant's motion for judgment notwithstanding the verdict or new trial was denied by order dated October 13, 1989.

Defendant thereafter filed a claim of appeal to the Michigan Court of Appeals, contending that it was entitled to judgment in its favor because the plaintiffs' proofs were insufficient to establish *any* of the requisite elements of a 42 USC § 1983 cause of action, that the trial court erred in its instructions to the jury regarding these elements, and that the trial court erred by

excluding from evidence a videotape of a television interview with Diana Davis. The plaintiffs filed a cross-claim of appeal, contesting the adequacy of the jury's verdict and the court's award of attorney fees, as well as the trial court's orders granting summary disposition to Wayne County and denying plaintiffs the right to assert a cause of action for violation of the Michigan Constitution.

After extensive briefing and oral argument, the Court of Appeals released its unanimous decision on September 20, 1993, reversing the judgment entered against defendant and remanding the case for entry of judgment in its favor. Although the Court found that any constitutional deprivation was committed "under color of state law", it did not specifically address defendant's argument that there had been no *constitutional* violation. However, noting that "liability for an officer's off-duty conduct that results in death or bodily injury to citizenry may only be imposed where that officer's conduct is directly related to a policy, or lack of policy, adopted with deliberate indifference to the rights of citizens", the Court reversed the judgment entered against defendant, specifically finding that (a) plaintiffs had failed to produce sufficient evidence of a relevant policy; (b) plaintiffs had failed to produce sufficient evidence of deliberate indifference and had, at most, produced evidence of negligence; and (c) plaintiffs had failed to produce sufficient evidence of a causal link between the harm suffered by the plaintiffs and any alleged policy. Having so concluded, the Court did not consider defendant's other allegations of error.

The Court of Appeals then considered and rejected each of the issues raised by plaintiffs on their cross-appeal, including plaintiffs' argument that they should have been allowed to add a count against defendant based on an alleged violation of the Michigan Constitution: "In this case, having concluded that the actions of defendant were not the cause of whatever violations may have occurred, the question whether a state con-

stitutional tort exists independent of this § 1983 claim is also moot."

Plaintiffs have now filed a Delayed Application for Leave to Appeal, contending that the Court of Appeals erred when it concluded that plaintiffs had failed to prove the existence of a relevant policy or custom, erred when it concluded that plaintiffs had failed to prove that defendant was deliberately indifferent to constitutional deprivations, and erred when it concluded that plaintiff had failed to prove that the harm suffered by plaintiff was caused by any alleged policy or custom. Plaintiffs further contend that the Court of Appeals erred when it concluded that, pursuant to the opinions rendered in *Smith* v *Department of Public Health*, 428 Mich 540 (1987), a failure of proof under 42 USC § 1983 would also constitute a failure of proof under any cause of action under the Michigan Constitution.[10]

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10 Although it believes that this Court should deny plaintiffs leave to appeal, in the event that leave is granted to consider the elements of a § 1983 cause of action, defendant has filed a cross-application for leave to appeal asking that it also review the elements of "color of state law" and "constitutional" deprivation.